

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From January 1, 1940
Through March 31, 1940
Volume XVIII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from January 1, 1940 through March 31, 1940.

The Act referred to above requires that seven copies of this Quarterly report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

THOMAS S. LAWSON,
Attorney General.

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OPINIONS

January 3, 1940.

Hon. P. B. Hamilton, Chairman,
Personnel Board, Mobile County,
Mobile, Alabama.

Mobile County Merit System Act—

Persons appointed prior to the expiration of the period of ninety days allowed the Board for organizing and preparing for the administration of the act entitled to retain positions until such time as these positions may be filled from employment register or as otherwise provided by the act (Act No. 470 H. 952, approved September 15, 1939).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 3, 1940, in which you request my opinion as follows:

"By Act No. 470, approved September 15, 1939, the Legislature established for the City and County of Mobile and for certain other cities in Mobile County a Merit System Civil Service Act. Section 18 of the act authorizes provisional appointments under the circumstances detailed therein. By Section 37 it is provided that while the act should become effective immediately upon its enactment, a period of ninety days thereafter should be allowed in which to organize and prepare for the administration thereof. Between the ninety day period from September 15th to December 15th, the Personnel Director was requested by several of the appointing authorities to approve nominations for provisional appointments as provided by Section 18. This was done by the Director in each occasion, the Director assuming that appointments made during the ninety day interim must be made as provided by Section 18. It now appears that in certain instances where supposed provisional appointments were made the sixty day limitation provided by Section 18 has expired but there is not available an employment register from which new appointments may be made for the reason that the Board and the Director required the full ninety day period authorized by Section 37 to organize and prepare for the administration of the act. No action was taken by the Board at any time during the period from September 15 to December 15 indicating an intent to put the act into operation before the latter date.

"The question therefore presents itself as to the status of those employees supposedly appointed under the provisions of Section 18. Can the Director continue to certify the employees so appointed as being properly employed even though the sixty work days provided by Section 18 have expired since their appointment or must the positions which they fill be declared vacant and new appointments made?"

Upon careful consideration of the Mobile County Merit System Act, in its entirety, the conditions which led to its enactment, and the ends to be accomplished thereby, I am persuaded that the employees concerning whom

you inquire are not precluded from continuing in their present employment, but may retain their respective positions until such time as such positions may be filled from an employment register or as otherwise provided by the act.

It is my judgment that the procedure followed in connection with the so-called "provisional appointments" made between September 15, 1939, and December 15, 1939, could not be deemed equivalent to the "provisional appointment" prescribed by Section 18.

You will note that by Section 15 of the act it is provided that appointments shall be made by each appointing authority from names certified to him by the Director from an appropriate register, and in those instances where sufficient names of eligibles are not available it is provided that a "provisional appointment" may be made by the appointing authority. Then follows a legislative mandate that:

"In the event that there does not exist an Employment Register which the Director deems appropriate for the class in which the position is established, he shall prepare such a Register within a reasonable time after receipt of the request of the Appointing Authority that eligibles be certified."

The provisions of Section 15 provide the clue to the real purpose of Section 18, i. e., to act as a safety valve during such emergency as might occur when the demand for personnel should exceed the supply on the employment registers.

It is not to be supposed that the Legislature intended to authorize provisional appointments, approved by the Director and subject to his control, and the control of the Board, prior to the date on which the act was placed into operation by the Board.

The very language of Section 18 indicates a contrary intent. It is provided that the Director is to authorize a "provisional appointment" to a vacancy "only until an appropriate register can be established and an appointment made therefrom." This, when read with the limitation of the employment for a maximum aggregate period of sixty work days, clearly contemplates that the Director shall establish the register within sixty days. But, as hereinafter shown, the Legislature granted the Board a ninety day period in which to set up the act, including the establishment of appropriate registers. Thus it would appear that to construe Section 18 as authorizing provisional appointments more than sixty days before appropriate registers could feasibly be established by the Board would be to do extreme violence to the legislative intent.

Section 37 evinces a clear legislative intent to permit an orderly and deliberate installation of the system established by the act, provided, of course, that such installation should be completed within ninety days from the date of enactment of the statute. Until the system was organized and placed in operation neither the Board nor the Director could exercise control over any employee in the Service. Indeed as to those employees in the Service at the time of the passage of the act, Section 37 recites:

"* * * during such ninety (90) day period any persons in the employ of such county, or department, or officer, or of any municipality thereof, at the time of the passage of this act shall continue in all respects under and subject to the laws to which they were subject at the time of the passage of this act."

It is, therefore, my conclusion that Section 37 gives to the Mobile County Personnel Board the authority to prescribe the date on which the act should become effective, subject, of course, to the ninety day limitation, and the attempted exercise of authority over employees in the Service prior to such declared effective date has, in my judgment, no binding effect either on the Board or the employees. The action of the Director in affixing his approval to the purported "provisional appointments" cannot be construed as effecting the provisional appointment contemplated by Section 18. Cf. Opinion rendered under date of May 31, 1939, to Hon. I. J. Browder, Personnel Director, Capitol, Quarterly Report of Attorney General, Vol. XV, page 253. See also *Heck v. Hall*, 190 So. 280, 289 (h.n.32).

Those employees engaged before December 15, 1939, which date you state to be the date on which preparations were completed by the Board to place the act in effective operation, may continue in their present positions without regard to their prior appointments until such time as examinations shall be given and provision made for filling the positions which they occupy. Of course, such employees would be required to take the competitive examination prescribed by the statute, they not being within the class specified in Section 12 as being excepted therefrom.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 5, 1940

Hon. O. H. McRight,
Sheriff, Colbert County,
Tuscumbia, Alabama.

Witness fees in cases withdrawn and filed--

Witness fees which have accumulated up to the time of withdrawal and filing of an indictment are payable out of the fine and forfeiture fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 27, 1939, in which you request my opinion as follows:

"I would appreciate an opinion from you on the following:

"In cases that are withdrawn and filed, are the witness fees a claim against the fine and forfeiture fund?"

My answer to your inquiry is in the affirmative. See Section 4039, Code of Alabama, 1928 (Michie), which section deals with the fine and forfeiture funds of the various counties, where it says: "* * * or where the indictment has been withdrawn and filed. * * *" See also Quarterly Report of the Attorney General, Vol. XV, page 247.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 5, 1940.

Hon. J. C. Pattillo,
Clerk, Circuit Court,
Chilton County,
Clanton, Alabama.

Solicitor's Fees—Where the defendant is convicted for attempting to manufacture liquor, the solicitor's fee for such conviction is \$10.00.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 14, 1939, in which you request my opinion as follows:

"A defendant was indicted in the Circuit Court of Chilton County in two counts, one count for manufacturing whiskey and the second for having a still in possession. He was convicted for an attempt to manufacture whiskey.

"The question that I am undecided about is what amount of Solicitor's fee should be charged, whether the \$10.00 fee for each conviction of a misdemeanor not otherwise provided for or the fee for each conviction of the prohibition law, being \$30.00"

"I wish you would please advise me what amount of Solicitor's fee should be charged in a case of this kind."

The solicitor's fee for the conviction of a person for attempting to manufacture liquor \$10.00. This is provided for in the schedule of fees for solicitors under Section 3738, Code of Alabama, 1923, where it says: "For

each conviction of a misdemeanor not otherwise provided for \$10.00" This has been the uniform holding of this office. See Biennial Report of the Attorney General, 1926-28, page 520.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940

Honorable T. C. Almcn,
Judge of Probate,
Morgan County,
Decatur, Alabama

Licenses—Municipalities—

A licensee under Schedule 63 of Section 348 of the Revenue Act of 1935 as a dealer in fireworks, etc., is not authorized to sell fireworks in a municipality or the police jurisdiction thereof, which has duly adopted an ordinance prohibiting the sale of same.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of November 17, 1939, in which you request my opinion as follows:

"Schedule 63, of the Revenue Code, provides that a license may be issued for the sale of fireworks upon payment of \$45.00 if within two miles of certain designated cities and \$15.00 other places in the County. There is also a Section of the Code that gives to cities of 5,000 population or more, police jurisdiction for a radius of three miles from the corporate limits.

"Decatur, Alabama is a City of more than 5,000, and the governing body of the City has passed an ordinance prohibiting the sale of fire works within the City limits or the police jurisdiction thereof.

"In your opinion, if we issue a license for the sale of fire works and charge the \$45.00, would the buyer be permitted to sell fire works outside the City limits but within the police jurisdiction?"

I am of the opinion that your inquiry should be answered in the negative. I must assume that the ordinance in question is validly enacted in view of the absence of any attack on its validity. *Titus v. Braidfoot*, 226 Ala. 21, 145 So. 423.

Section 1954 of the Code of 1923 reads as follows:

"1954. Police jurisdiction; territorial—The police jurisdiction in cities having six thousand or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than six thousand inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. **Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights of way belonging to the city or town.**" (Emphasis supplied)

Therefore, this ordinance has full force and effect not only within the city limits, but also within the police jurisdiction.

See *White v. City of Decatur*, 225 Ala. 646, 144 So. 873; *Coursey v. City of Andalusia*, 24 Ala. App. 247, 134 So. 671.

This identical question was presented to the Supreme Court in *Chappel et al. v. City of Birmingham, et al.*, 236 Ala. 363, 181 So. 906. The Court in that case held that an ordinance, of the city of Birmingham prohibiting the keeping, use, manufacturing, sale or handling of fireworks within the city's extended police jurisdiction except by persons using signaling devices for current daily consumption, was valid as a reasonable exercise of police power and a reasonable classification, notwithstanding the fact that the State license schedules provide for the licensing of such businesses.

Therefore, it is my opinion that the ordinance of the City of Decatur prohibiting the sale of fireworks makes it unlawful to sell fireworks either within the city limits or within the police jurisdiction of same. This is true although the revenue laws of the State prescribe a license for selling fireworks. The prohibition is applicable to one who has purchased said state license; *Mitchell v. City of Birmingham*, 220 Ala. 389, 133 So. 13, see also *Casmus v. Lee*, 183 So. 185.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 8, 1940.

Hon. H. H. Evans,
County Solicitor,
Calhoun County,
Anniston, Alabama.

Alabama Beverage Control Act—

Witnesses—

1. Former employee, agent or officer of the Alabama Alcoholic Beverage Control Board summoned to attend court as a witness in a case arising out of the discharge of his official duties while such employee, agent or officer, held entitled to regular witness fees and mileage only.

2. In such case, the Alabama Alcoholic Beverage Control Board held not entitled to the regular witness fees and mileage of such person, nor authorized to pay to such person the necessary expenses actually incurred by him in attending court.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of December 21, 1939, in which you request my opinion as follows:

"I would like to have your opinion on the following questions:

"Under Section 7734, et seq. of the Code of Alabama (Chapter 290, Article 7), a witness may be required to attend court under penalty of attachment and arrest thereon, without provision as to expenses (in some cases the witness certificates not being paid dollar for dollar).

"As I understand the system under the Alabama Beverage Control Act, officers working under the Alabama Alcoholic Beverage Control Board are paid by the Board a salary, mileage, and actual expenses to and from court, and certificates for attendance on said court, including mileage and witness fee, are remitted by said officers to the Alabama Alcoholic Beverage Control Board.

"(1) The first proposition is as to the liability of the Board to witness no longer officers for the Alabama Alcoholic Beverage Control Board for the payment of their mileage and actual expenses; and (2) the question of whether the former official is entitled to hold and collect the witness fees and mileage from the county in which court is attended, or should he be required to pay or transfer same to the Board,

"The importance of your opinion on these questions is emphasized when we consider that the witnesses who are no longer with the Board are reluctant to attend court, and considerable difficulty is experienced by the Judges and Solicitors in disposing of cases, and also that there is a hardship placed upon such witnesses by reason of the fact that their witness certificates are not always redeemable in cash."

Section 3762 of the Code of Alabama, 1923, as amended by Act No. 105, S. 141, approved October 19, 1932, General Acts, 1932, page 102, fixing the fees and compensation of witnesses in criminal cases, provides as follows:

"FEES AND COMPENSATION OF WITNESSES.—Witnesses in criminal cases are entitled to seventy-five cents per day and five cents for

each mile to and from their residence by the route usually traveled, and all necessary ferriages and toll."

Section 7233 of the Code of Alabama, 1923, fixing the fees of witnesses in civil cases, provides as follows:

"Fees of witnesses for mileage and attendance.—Witnesses are allowed one dollar and fifty cents per day in civil cases; also five cents per mile for each mile to and from their residence by the usual traveled route, and all necessary ferriage, tolls of turnpikes and toll bridges, whether attending under subpoena, or at the request of the party."

In my judgment, a former employee, agent or officer of the Alabama Alcoholic Beverage Control Board summoned to attend court as a witness in a case growing out of the discharge of his official duties while such an employee, agent or officer is entitled to compensation in accordance with the above cited statutory provisions (whether he would be entitled to compensation pursuant to Section 3762, as amended, *supra*, or Section 7233, *supra*, would depend on whether or not he was summoned as a witness in a criminal or a civil case).

I know of no statutory authority for the Alabama Alcoholic Beverage Control Board collecting the fees and mileage of such a witness, nor do I know of any authority of law for the Alabama Alcoholic Beverage Control Board paying the actual expenses necessarily incurred by such a witness in attending court. In such cases, the former employee, agent or officer of the Alabama Alcoholic Beverage Control Board attends court as a witness in the capacity of a private citizen and not in the capacity of an employee, agent or officer of the Alabama Alcoholic Beverage Control Board.

In reaching this conclusion, I have not overlooked the statements contained in the last paragraph of your letter, with which I am very much impressed, but under the generally accepted rule in regard to the compensation of witnesses and our existing statutory law on the subject, I am unable to reach any other conclusion. In 70 C. J. 67, we find the following statement:

"Witnesses are entitled to compensation only under statutes providing therefor. They are not entitled thereto at common law, or in cases for which the statute does not provide. Statute relating to calling of witnesses and making no provision for their compensation do not entitle them thereto."

Cf. Opinion to Hon. T. Weller Smith, Chief, Alabama Highway Patrol, Montgomery, Alabama, under date of June 28, 1939, Quarterly Report of Attorney General Vol. XV, page 225.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Person engaged in business of manufacturing cushions, mattresses, pillows and /or rugs, and /or the renovating, cleaning or reworking of same, in rural sections held liable for the minimum license prescribed by Schedule 88 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 24, 1939, in which you request my opinion as follows:

"Please refer to Schedule 88, 1935 Revenue Act and advise us whether or not this applies to rural sections as well as towns and the amount of license due, if any, in the rural sections. This schedule is a little confusing as to whether or not it applies to rural sections and if so which amount is correct."

Schedule 88 of the 1935 Revenue Act reads as follows:

"Schedule 88. Each person, engaging in the business of manufacturing cushions, mattresses, pillows and /or rugs, and/ or the renovating, cleaning or reworking of same, shall pay for the privilege of engaging in such business, fifteen dollars (\$15.00). Provided, however, the license shall be five dollars in towns of 3,000 or less population."

You will note that the license of \$15.00 levied by said schedule would apply to all persons engaged in the business for which the license is levied, regardless of the place where the business is located, whether in cities, towns or rural sections, except for the proviso contained in the last sentence thereof. While the language of the schedule is confusing on the question of whether or not it applies to persons engaging in the business therein dealt with in rural sections, and as to the correct amount of the license to be paid by such persons, if it does so apply, it is my opinion that it was the intention of the Legislature to require all persons engaging in the business for which a license is levied by said schedule in cities or towns of over 3,000 population to pay the higher license, and to require all persons engaging in such business in all other places, whether incorporated or not, to pay the lesser license provided therein, to wit, \$5.00.

The intention of the Legislature in enacting a law, when ascertained, is the law itself. **City of Birmingham V. Southern Express Co.**, 164 Ala. 529, 51 So. 159.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940.

Hon. Judson C. Locke,
Member, House of Representatives,
Perry County,
Marion, Alabama.

Municipal Corporation—City Clerk—

A non-resident of municipal corporation may, if elected or appointed by the City Council, hold the office of City Clerk and perform the duties and exercise the powers prescribed by the Municipal Code of Alabama, Code of Alabama, 1923, Section 1915-19.

The City Council or governing body of such city or town may by ordinance prescribe the qualifications for such office, and may select a non-resident to hold the same.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of December 18, 1939, in which you request my opinion as follows:

"I am requested to ascertain if a party who resides outside of the city limits, but is a qualified elector in the County, is eligible for the position of City Clerk. This party, as stated, is not a resident of the city, does not live within the city limits, but does vote in the County.

"Will the acts of the city clerk, who does not reside in the city limits be valid? I will thank you for your opinion in this matter."

I am not familiar with any provision of law which prohibits a non-resident of any city or town from holding office as City Clerk of a city or town. (43 Corpus Juris 624-625).

The City Council is authorized to prescribe the qualifications and duties of the City Clerk in addition to the duties prescribed by the Municipal Code itself. (Code, 1923, Sections 1915-19, inclusive.) I am of the opinion that the City Council itself may by ordinance require that the Clerk be a resident of the city or town. Or, if they choose, they may appoint or elect a non-resident to hold that office.

It is customary in the smaller municipalities to employ a City Attorney, very frequently a non-resident.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940.

Hon. W. H. Quillin,
Judge, Law and Equity Court,
Franklin County,
Russellville, Alabama.

Act No. 156, S. B. 143, approved March 6, 1939—

Where an appeal is taken from a justice of the peace court to a law and equity court, or court of like jurisdiction, and a plea of guilty is entered in such court and no appeal is taken, defendant is not entitled to the benefits of Act No. 156, supra.

Dear Sir:

Opinion by Assistant Attorney General, McQueen.

I have your request for official opinion dated December 21, 1939, which reads as follows:

"I received your recent opinion in regard to defendants being exempt from Solicitor's fees, trial taxes and other costs in certain cases for violating the highway code, if a plea of guilty is entered and the defendant does not appeal. I think that your opinion covers the subject and is sound. However, there is one point that it fails to cover.

"If a defendant has a case made against him before a Justice of the Peace for driving a vehicle while intoxicated and the defendant pleads not guilty and is fined by the Justice of the Peace for said violation under the authority of the case of Pharr vs. Whittle 185 So. 895. Said defendant after conviction in Justice Court appeals his case to the Law & Equity Court of Franklin County under the authority of Section 18 of the Local Act of 1923 page 276 and when the case reaches said Law and Equity Court said defendant pleads guilty to the offense charged in the Law & Equity Court and is fined for driving while intoxicated and no appeal is taken from the Law & Equity Court to the Court of Appeals by said defendant, should the Solicitor's fee and trial tax be taxed against said defendant?

"If a defendant pleads guilty to a charge of driving while intoxicated on a highway in Justice of Peace Court and appeals his case to the Law & Equity Court and again pleads guilty in the Law & Equity Court of Franklin County and is fined for driving intoxicated by the Law & Equity Court to the Court of Appeals, should a Solicitor's fee and trial tax be charged against the said defendant in Law & Equity Court? When this defendant pleads guilty before the Justice of the Peace he was fined by the Justice of the Peace before he appealed his case to the Law and Equity Court."

You propound two questions in the above request, i. e.,

(1) where a defendant pleads not guilty in a justice of the peace court of driving a motor vehicle while intoxicated and is convicted, and

appeals his case to the Law and Equity Court of Franklin County, and in that court pleads guilty and takes no appeal; and (2) where a defendant pleads guilty in a justice of the peace court of driving a motor vehicle while intoxicated and is fined by the justice of the peace, and appeals his case to the Law and Equity Court of Franklin County, and in that court pleads guilty and takes no appeal; you wish to know whether or not this defendant is entitled to the benefits of the exemption from certain items of cost granted by Act No. 156, S. B. 143, approved March 16, 1939, page 229, General Acts 1939 (Pamphlet).

I am of the opinion that the defendant is not entitled to the benefits of Act No. 156, supra, in either of the instances as outlined above.

The Court of Appeals of Alabama, in the case of **Richards v. State**, 190 So. 421, in considering this act, said as follows:

"It gives the defendant, who pleads guilty, the benefit of exemptions from certain costs, otherwise to be taxed, but it is perfectly plain that where a defendant **takes an appeal** after a plea of guilty the exemptions named in the act do not apply." (Emphasis supplied).

I am of the opinion that the same rule as laid down in the **Richards** case, supra, would apply on a plea of not guilty as well as on a plea of guilty when an appeal is taken. In other words, I believe that when a defendant takes an appeal either after a plea of guilty or a plea of not guilty he would not be entitled to the benefits of the act under consideration.

It is true that both justice of the peace courts and the Law and Equity Court of Franklin County are both under the purview of the act under consideration. However, I am of the opinion that when a defendant appeals his case from one court that is within the purview of the act, to another court that is also within the purview of the act, and in the latter court pleads guilty and takes no appeal, he nevertheless deprives himself of the benefits of the act by taking an appeal in the first instance. You are therefore advised that in my opinion in all misdemeanor cases that come within the provisions of the act which are appealed to your court, from a justice of the peace court, you should charge the same costs and fees which were chargeable before the passage of this act.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Probation and suspension of execution of sentence—

Persons placed on probation entitled to hearing before revocation of probation or revocation of order suspending execution of sentence.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of November 17, 1939, in which you request my opinion as follows:

"The Law & Equity Court sentenced a defendant to six months hard labor for Petit Larceny. The six months sentence was in the regular form and in the last paragraph of the sentence at the end of the sentence on the minutes of the court the court said:

" 'It is the order of the court that said sentence is hereby suspended until the further order of this court, and the court retains jurisdiction of this cause for the purpose of putting this sentence in force and effect at any time within a period of five years from this date without assigning any reasons therefor.' Dated this November 1, 1939.

"Please advise me that if under the new Probation Law, the above order is legal and can be enforced without giving the defendant a hearing when the sentence is put in force?"

As I understand your inquiry, the sole question which you present to this office for opinion is whether, where sentence is suspended by the court and defendant placed on probation, the order placing the defendant on probation may be revoked and the sentence put into effect without permitting the defendant a hearing.

In my opinion, the act itself plainly evinces the legislative intent to require a hearing before there may be a revocation of probation or suspension of execution of sentence. I call your attention to Section 6 of the act which, after first providing that at any time during the period of probation or suspension of execution of sentence the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence, concludes:

"Thereupon the court, after a hearing, may revoke the probation or suspension of execution of sentence and shall proceed to deal with the case as if there had been no probation or suspension of execution of sentence; and, in cases certified from a court of inferior jurisdiction, shall order and adjudge that the sentence be immediately executed." (Emphasis supplied).

You, are, therefore, advised that the order quoted in your inquiry cannot be enforced without giving the defendant a hearing when the sentence is put into effect.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 8, 1940.

Hon. Robert T. Simpson, Jr.,
Solicitor, 11th Judicial Circuit,
Florence, Alabama.

The fee provided for by Section 4659, Code of Alabama, 1923, as amended by Act No. 183, Section 112, approved April 20, 1933, (General Acts, 1933, page 200) is payable when a defendant is convicted for manufacturing liquor, regardless of whether or not the sentence is suspended and the defendant placed on probation.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 12, 1939, in which you request my opinion as follows:

"Please advise me whether or not the Sheriff is entitled to his \$50.00 fee where a defendant pleads guilty of manufacturing liquor and is placed on probation under the new probation act."

In answer to your inquiry, I call your attention to Section 4659, Code of Alabama, 1923, as amended by Act No. 183, Section 112, affirmed April 20, 1933, (General Acts, 1933, page 200). This Section, as amended is as follows:

"When any person is convicted of violating the provisions of Sections 4656 and 4657, Article Three, Chapter 167, of the Criminal Code of Alabama, 1923, there shall be charged in the bill of cost a sum of Thirty-Five Dollars, from and after the time that this Act becomes effective, and up to the second Tuesday in January, 1935, and after said date the sum of Twenty-Five Dollars, to be allowed the person who furnished the evidence and brought about the conviction of any person or persons for the violation of the said respective sum as above specified, shall satisfy the presiding judge that he is the person entitled to same, and shall receive from the judge a certificate to that effect, and such persons may be the sheriff of the county, deputy, or any other person furnishing the evidence necessary for conviction. Provided, however, that from and after the second Tuesday in January, 1935, the sum so paid under this Section shall be limited to Twenty-Five Dollars. And, provided further, after this Act becomes effective, that only one such amount shall be paid under this Section for a conviction of any number of persons, more than one, for a violation of either of said referred to sections where the evidence shows that the still, apparatus or appliance, is one and the same."

You can see from the above Section, as amended, that the fee allowed to be charged now is \$25.00. This fee is paid on conviction whenever the same is properly certified to by the presiding Judge, whether the defendant is placed on probation or not. (See Section 8 of Act No. 278, Section 198, approved August 24, 1939)

I call your attention to an opinion of this office rendered October 17, 1939, to Honorable Wm. A. Conrad, Clerk of the Circuit Court, Mobile County, a copy of which is enclosed.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940.

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

"Court of County Commissioner authorized to furnish office equipment for the administration of its duties to the Emergency Crop Relief Program of the Federal Government.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 13, 1939, in which you request my opinion as follows:

"The Administrators of the Emergency Crop Relief Program of the Federal Government have requested the Court of County Commissioners of this County to furnish them such office space and equipment as may be necessary for the administration of this program in Bullock County.

"Please advise me whether or not the Commissioners Court is authorized to make an appropriation out of the general fund of this County for this expense.

I am of the opinion that the Court of County Commissioners of Bullock County may legally use county funds for the purpose of providing office space and office equipment for the Emergency Crop Relief Program of the Federal Government.

Authority for this position is found in several opinions heretofore rendered by this office.

Biennial Report of the Attorney General 1932-34, pp. 595, 629. Quarterly Report of Attorney General, Vol. 111, 6. 116. Opinion rendered to Judge D. Hardy Riddle of Talladega County on November 29, 1939, a copy of which is herewith enclosed.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Licenses—Motor vehicles—

Period of grace allowed by State Department of Revenue, pursuant to the provisions of Section 2 of Act No. 67, H. 21, approved February 9, 1937, General Acts, 1936-37, page 86, to purchaser of motor vehicle within which to secure license, held to amount to period of grace only and not extension of due date of license.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 27, 1939, in which you request my opinion as follows:

"As you know, the law permits the purchaser of a motor vehicle four (4) days of grace immediately following said purchase within which to secure a tag, and not be subject to a penalty for any delinquency.

"In the light of this provision of law, I should like to be advised in answer to the following question:

"If A buys a new automobile on the 13th day of December and applies to the Probate Judge for his tag on the 15th day of December, should the Judge charge him a license or tag cost based on eleven (11) months, or should he charge on a basis of a full year?"

Section 2 of Act No. 67, H. 21, approved February 9, 1937, General Acts, 1936-37, page 86, provides:

"The purchaser of any motor vehicle requiring a tag shall have such time to purchase the necessary tag for such motor vehicle under such rules and regulations as may be prescribed by the State Tax Commission."

It is my information that the State Department of Revenue (formerly the State Tax Commission) has promulgated a rule or regulation allowing the purchaser of a motor vehicle ninety-six hours, or four days, immediately following the purchase within which to secure a license without being subject to any penalties for delinquency, provided certain requirements set out in the rule or regulation are met.

Motor vehicle licenses are due on November 15 of each year and delinquent after that date. Schedule 158.17 of Section 348 of Chapter 6 of Article XIII of the 1935 Revenue Act, as amended by Act No. 212, H. 104, approved

August 8, 1939, and opinion to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 8, 1939, a copy of which previously has been furnished to you.

After the beginning of the tax year, a person becomes liable for motor vehicle license immediately upon operating the motor vehicle upon the public highways of the State, and would be then subject to the penalties for delinquency provided by statute except for the grace periods for the purchase of license allowed by statute or by rule or regulation made by the State Department of Revenue, pursuant to statutory authority vested in said department.

Act No. 67, *supra*, provides for the purchase of motor vehicle licenses on a monthly declining basis, and Section 1 thereof reads in pertinent part:

"Provided, however, that for new and used automobiles acquired subsequent to November 15 in any tax year, these licenses shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year and that the purchaser shall only buy a license for the ten remaining months of the tax year."

In determining "the then remaining months of the tax year" under the above quoted statutory provisions, it is my judgment that the day on which the motor vehicle is first operated on the public highways of the State during the tax year should be used rather than the last day of grace allowed by the above referred to rule or regulation of the State Department of Revenue to the purchaser of an automobile within which to secure his license therefor. This, for the reason that the liability for the license attaches, as stated above, on the day the motor vehicle is operated upon the public highways of the State during the tax year.

Ergo, in the case presented by you, a full year's license would be due if the motor vehicle was driven by the purchaser on the public highways of the State prior to the day on which he made application for a license. Otherwise, if the motor vehicle was not driven on the public highways of the State until the day on which application for the license is made, to wit, December 15, the first day on which a motor vehicle license on a monthly declining basis may now be issued (see opinion to Judge Price, *supra*), the amount of the license should be figured on an eleven month basis.

Recapitulating briefly, the day on which the liability for license attaches, that is, the day on which the purchaser first drives the motor vehicle on the public highways of the State, governs rather than the last day of the grace period allowed for securing the license.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 8, 1940.

Mrs. W. Lee Stanley, Clerk,
Circuit Court, Colbert County,
Tuscumbia, Alabama.

Sales Tax Act—Recordation of executions issued under Section 20—

1. Executions issued under Section 20 of Act No. 18, H. B. 82, approved February 8, 1939, Pamphlet Acts, 1939, page 16, should be recorded on the minutes of the court.

2. Under rules and regulations promulgated by the State Department of Revenue, clerks of circuit courts allowed fifteen cents per hundred words for recording such executions, as provided by Act No. 18, H. B. 82, approved February 8, 1939, Pamphlet Acts, 1939, page 16, payable from the expense fund for the administration of said act.

Opinion by Assistant Attorney General McQueen.

Dear Madam:

I have your letter of November 27, 1939, in which you request my opinion as follows:

“A portion of Section 11 of the Alabama Sales Tax Act, (Gen. Acts 1936-37, p. 134) reads as follows:

“ ‘The Sheriff shall within five days after the receipt of the warrant, file with the Circuit Clerk of his county a copy thereof, and there-upon the Circuit Clerk shall enter in the judgment roll, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns, the amount of the tax, or portion thereof and damages for which the warrant is issued; and the day when such copy is filed.’

“Will you kindly advise what a ‘judgment roll’ is, also is there a docket printed for this purpose, and if not, what book in the Clerk’s office would answer this purpose.

“What fees, if any, would the Clerk be entitled to for this service?”

“I would appreciate an opinion at an early date, as I have some cases of this nature and would like to get this matter settled.”

In my opinion, the term “judgment roll” used in Section 11 of the act referred to in your request, which has been reenacted, in substantially the same form, as Section 20 of Act No. 18, H. B. 82, approved February 8, 1939, (Pamphlet Acts, 1939, page 16), is the same as the minutes of the court upon which judgments in ordinary cases are recorded.

Subsection 8 of Section 6724 of the Code of Alabama, 1923, provides as follows:

"It is the duty of the clerk of the circuit court: * * * 8. To keep a book, in which must be entered the minutes of each day's proceedings during the term of the court, and the orders and judgments, in the order in which they are made or rendered."

In *Ansley v. Carlos*, 9 Ala. 973, the court said:

"In most of the States of this Union, the ancient common law judgment roll has gone out of use, or rather was never adopted, and other methods have been devised to perpetuate the judgment. In this State we have a statute, (Clay's Dig. 144, Sec. 7) making it the duty of the clerks of the several courts, 'within three months after the final determination of any suit or prosecution, to make up and enter in well bound books to be kept by him for that purpose, a full and complete record of all the proceedings in such suit or prosecution.' This is doubtless the final record, answering to the judgment roll of the common law."

I call your attention to the pertinent parts of Sections 32 and 35 of Act No. 18, *supra*, which read respectively as follows:

"The Department shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may deem necessary to enforce its provisions."

"Any and all expenses including salaries necessary to provide for the administration and enforcement of this act shall be paid out of the proceeds of the collection therefrom."

I am advised by the State Department of Revenue that it has promulgated a rule under authority of Section 32, hereinabove, allowing clerks of the circuit court who record executions (which are the same as "warrants" used in the excerpt which you quote from the 1936-37 Act) fifteen cents per one hundred words for the recordation of such executions. This rule is within the authority of the State Department of Revenue under said section, *supra*. I suggest, therefore, that you send your bill for the recordation of such executions direct to the State Department of Revenue, and I am advised by said department that such bills promptly will be paid.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940.

Hon. J. C. Kellett,
 Judge of Probate,
 DeKalb County,
 Fort Payne, Alabama.

Licenses—Coal Dealers—

1. All of statutory prerequisites must exist before party liable for coal dealer's license.
2. Mere fact that hosiery mill sells coal only to employees does not exempt mill from coal dealer's license, if other statutory prerequisites are present.

(Schedule 36.1, Revenue Act of 1935).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 27, 1939, in which you request my opinion as follows:

"Will you please render an opinion as to whether or not a hosiery mill who sells coal and delivers the same to its employees only would be liable for a coal dealer's license under Schedule 36.1 of the Revenue Code. We are informed that this service is given to employees only and we understand the coal is furnished at very little above wholesale cost.

"Will you please give an opinion on this at your earliest convenience "

Schedule 36.1 of the General Revenue Act of 1935 (Act No. 194, H. B. 324, approved July 10, 1935) is as follows:

"SCHEDULE 36.1. Each person dealing in COAL or COKE and maintaining one or more established yards, with adequate wagon or truck scales, from which yard or any yard of an established dealer, all retail deliveries are loaded, in cities or towns of:

"5,000 or less, whether incorporated or not	\$ 5.00
5,000 to 20,000	10.00
20,000 or more	20.00

"for each yard. This Schedule shall not apply to persons whose inventory and sales are in quantities of less than one-half ton. Each such person shall, within thirty days after the approval of this Act and annually thereafter at the time of paying for and procuring his

dealer license, register with the officer in the county collecting and issuing licenses the number of trucks to be operated from his one or more yards and shall at the time of such registration pay a fee of one dollar (\$1.00) per truck for each truck so used, and shall procure a tag for each truck, showing the year for which it is issued, the registration number, and the term 'Coal-Coke Dealer or Hauler,' and the abbreviation of Alabama, and such tag shall at all times be conspicuously displayed next to the regular license tag on all trucks engaged in this business. The dimensions of this tag shall be not less than four inches by eight inches, and it shall be of a color different from the then current license tag. The registration fee herein provided shall be in addition to the regular motor vehicle license fee."

In reply to your inquiry, you are advised that if the mill described in your inquiry maintains one or more established coal yards with adequate wagon or truck scales, from which yard or yards retail deliveries are loaded, then it would be subject to the license imposed on such operations by Schedule 36.1, supra of the General Revenue Law of 1935. There is nothing in Schedule 36.1, supra, which evinces a legislative intent to exempt therefrom coal dealers selling to their employees only. Biennial Report of Attorney General, 1934-36, page 340.

In short, the liability of the mill for the license levied by either Schedule 36.1 or 36.2 would depend upon the manner of operating, for Schedule 36.1 levies a license upon a particular type of operation, and before liability can be imposed, all of the prerequisites of the statute must be in existence.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 8, 1940.

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Licenses—

1. Worthless check is not efficacious to secure license, and purported license secured by worthless check is in effect no license.
2. Person doing business under purported license secured by worthless check may be prosecuted for doing business without a license, and the lien of the state for such license may be enforced.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of December 16, 1939, in which you request my opinion as follows:

"On or about the 14th day of November, 1939, a resident citizen of this county purchased from me the following: truck tag, automobile tag, and business license and drivers permit. In payment for these items a check was given to me as probate judge of this County. This check was duly deposited for collection but the same was returned unpaid.

"Please advise me whether or not these license, tags, drivers permit etc. are subject to revocation for the non payment of this check.

"Under date of Feb. 23, 1928 an opinion was rendered by your office to W. W. Brandon of Tuscaloosa County, and I will thank you to advise me as to whether or not this opinion prevails under the present revenue law."

In my opinion, the conclusions reached in the opinion to Hon. W. W. Brandon, Judge of Probate, Tuscaloosa County, Tuscaloosa, Alabama, under date of February 23, 1928, Biennial Report of Attorney General, 1926-28, page 447, are still applicable under our present revenue statutes. See also opinion rendered to Judge Brandon under date of October 16, 1928, Biennial Report of Attorney General, 1928-30, page 48.

Your attention is respectfully directed to Section 353 of the 1935 Revenue Act and its various subsections, particularly Subsection (b), which provides that if a delinquent shall fail or refuse to take out a license, the license inspector shall institute, or cause to be instituted, criminal proceedings against such delinquent before any court having jurisdiction over such offense; and also to Section 371 of said Act and its various subsections, particularly Subsection (a), which gives the State of Alabama a lien upon all the property, the rights to property, real or personal, belonging to any person, for the amount of any tax, other than ad valorem taxes, due by such person.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 9, 1940.

Hon. U. G. Watford,
Sheriff, Houston County,
Dothan, Alabama.

Serving Attachments—

Where the sheriff receives a writ of attachment and executes the same by levying on several different articles, he would be entitled to only one fee regardless of the number of articles.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 28, 1939, in which you request my opinion as follows:

"I will appreciate very much if you will advise me, where an Attachment Writ issued out of the Circuit Court of Houston County, Ala., and I attach more than one item, can I as Sheriff charge more than for one levy or attachment. The above refers to a case where an individual sues against an individual doing business as West's Shows and I attached seven different things. All were located on the same lot of land."

Section 7287, Code of Alabama, 1923, is in part as follows:

"Fees allowed to sheriffs.—Sheriffs are allowed to receive the following fees for the following services: ***

"Levying attachment _____, \$3.00"

It is my opinion that a sheriff who levies an attachment is entitled to \$3.00 only, regardless of how many pieces of property it is necessary for him to levy upon. This conclusion is, of course, based upon the assumption that only one writ of attachment was issued.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 10, 1940.

Mrs. Edwina Mitchell,
Associate Member,
State Board of Pardons and Paroles,
Montgomery, Alabama.

Husband and Wife—Juvenile Courts—Nonsupport—

Under the provisions of Section 4489, Code of Alabama, 1923, courts sentencing persons for nonsupport of wife and children retain jurisdiction of such cases and have continued jurisdiction thereof.

Opinion by Assistant Attorney General McQueen.

Dear Madam:

I have your request for official opinion dated December 20, 1939, which reads as follows:

"Certain Judges of County Courts are directing orders to the Department of Corrections and Institutions for the release of men convicted and sentenced in their court for Nonsupport. These orders are being referred to this office.

"We are under the impression that a special law for Jefferson County provides continued jurisdiction in such cases. Do other County Courts retain such jurisdiction?"

In my opinion, your inquiry should be answered in the affirmative.

Your attention is called to Section 4489 of the Code of Alabama, 1923, which reads as follows:

"4489. Suspension of sentence after portion served.—The judge of said probate, domestic relations, or juvenile court may, after a part of such sentence has been served, also release said defendant from such sentence, to jail or hard labor, and suspend the remaining part thereof, and may make such order of support, and release defendant on probation subject to the same terms and conditions as provided for the probation of defendants not serving such sentence."

It will be noted from the above section that the court sentencing a defendant for nonsupport may suspend such sentence after a portion thereof has been served. In my opinion, since the court has this authority, it necessarily follows that the court also has continued jurisdiction of such cases and retains jurisdiction thereof at all times. Cf. Opinion of the Attorney General, Quarterly Report of the Attorney General, Vol. XVI, page 178.

Your attention is called to Section 19½ of Act No. 275, S. 186, approved August 25, 1939, which act created the State Board of Pardons and Paroles, which reads as follows:

"Section 19½. Juvenile and Domestic Relations Courts, Juvenile Courts, and Probate Courts having jurisdiction of juvenile and domestic relations cases and courts of like jurisdiction shall continue to exercise all the powers and to perform all the duties now vested therein by law with respect to suspensions of sentence, appointment of probation officers, supervision of parolees and probationers and all other matters connected with and arising out of the duties now imposed by law upon such courts in connection with juvenile and domestic relations cases, anything to the contrary contained in this Act notwithstanding."

I am, therefore, of the opinion that persons sentenced to imprisonment for nonsupport of wife or children may be released from custody upon the order of the court sentencing such persons, and it is not necessary for the State Board of Pardons and Paroles to enter an order for the release of such persons.

The case of **Montgomery v. State**, 231 Ala. 1, 163 So. 365, in which the Supreme Court held unconstitutional the so-called "suspended sentence law," was taken into consideration in writing the above opinion. I quote from the recent case of **Law v. State**, 191 So. 803, in which case the Supreme Court distinguished the general criminal laws of the State and the nonsupport laws of the State in so far as the suspension of sentence of persons convicted under the nonsupport statute are concerned:

"It is also contended that the court could not suspend the sentence had it been imposed, since thereby a parole would be effected in violation of section 124, Constitution, on the authority of **Montgomery v. State**, 231 Ala. 1, 163 So. 365, 101 A. L. R. 1394; *Id.*, 231 Ala. 41, 163 So. 377.

"(9) We will endeavor to interpret that situation without reference to the amendment recently adopted to the Constitution in that respect (see Act March 29, 1939, Gen. Acts, Sp. Sess. 1939, pp. 8, 9), as bearing upon the future conduct of this case. In the **Montgomery** case, *supra*, this Court was dealing with section 124, Constitution, in connection with the ordinary criminal cases in our courts. While this writer did not agree with that opinion, it should not now be questioned, and it is not our purpose to do so here. But there the question of punishment was the matter dealt with. It was with reference to crimes generally. The punishment imposed in such cases has a twofold purpose, (1) reformation of the convicted offender, and (2) a deterrent to others who might be disposed to commit such a crime. 16 Corpus Juris 1351, 15 Amer. Jur. 155.

"(10) But the primary purpose of the acts now under consideration, so far as we are here interested, is to secure the present enforcement of a duty owing by a parent to his child. 30 Corpus Juris 1112, 1113, section 954, notes 40, 41. Criminal statutes have no such purpose. The punishment here provided is only as an aid to such purpose. 30 Corpus Juris 1113. It is a stringent proceeding in certain situations to cause payment of alimony and maintenance, similar to that required in equity. Temporary provisions for support pending the hearing on appeal may be made as in equity. *State ex rel. Sellers v. Murphy*, 207 Ala. 290, 92 So. 661; *Ex parte Blue*, 218 Ala. 113, 118 So. 147.

"(11) When a fine or sentence is imposed, it is for the use of the person intended to be benefited. *Swindle v. State ex rel. Pruitt*, 225 Ala. 247, 143 So. 198; section 4481, Code.

"(12) The order of suspension must be made as a part of the judgment and sentence to effectuate the purpose stated. It is an exercise of a judicial function in thus accomplishing the purpose sought, not an executive. The proceeding is not to lessen or ameliorate the punishment or reform the offender, but to direct the proceeds of its enforcement, or as a substitute for its enforcement.

"(13, 14) Executive paroles are provided for their effect on the convict himself to secure a moral reformation of him. 46 Corpus Juris 1204; 20 R. C. L. 577. A judicial suspension on the conditions and for the purpose here named is for the purpose of benefiting the persons neglected by the delinquent defendant. The two having nothing in

common in their design. The power given by section 124, Constitution, to the Governor is an executive parole, such as above stated, and is for its effect on the offender.

"The procedure as provided in our statutes seems to be common among the states. 46 Corpus Juris 1363, et. seq., sections 229-231; 30 Corpus Juris 1112, 1113, section 954; 20 R. C. L. 623. So far as we have observed, it has never been questioned as an exercise of the power to parole. See, 30 Corpus Juris 1116; 13 R. C. L. 1191."

You call my attention to a special law in this regard applicable to Jefferson County. If you desire my construction or interpretation of such special law, I will be glad to do so upon your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 10, 1940.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

Great Seal of Alabama—

Under Section 133 of the Constitution of 1901, the Great Seal of Alabama is designated to be used officially by the Governor. It is possible that it may be used by other officials of the State when permitted to do so by legislative enactment.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 20, 1939, in which you request my opinion as follows:

"Your attention is respectfully called to the fact that the State Board of Health, by authority of Section 1087 of the Code of Alabama, issues certified copies of certificates of birth and death. In that connection we would like to place the official seal of the State of Alabama, namely the 'Alabama Great Seal', on copies issued.

"Please advise whether the State Medical Association of Alabama which is the Board of Health and recognized as the Department of Health of the State of Alabama, may use the above seal."

I assume that when you refer to the "Alabama Great Seal" that you have reference to the "Great Seal of the State of Alabama."

I am of the opinion that the Department of Health of the State of Alabama may not legally affix the "Great Seal of the State of Alabama" to certified copies of birth and death certificates issued by that Department.

Section 133 of the Constitution of Alabama of 1901 is as follows:

"Section 133. There shall be a seal of the state, which shall be used officially by the governor, and the seal now in use shall continue to be used until another shall have been adopted by the legislature. The seal shall be called 'The Great Seal of the State of Alabama.'"

Section 134 of the Constitution, *supra*, is in pertinent part as follows:

"The secretary of state shall be the custodian of the great seal of the state, and shall authenticate therewith all official acts of the governor, except his approval of laws, resolutions, appointments to office, and administrative orders. *** "

I do not think that these sections prevent the legislature from authorizing other officials and departments to use the "Alabama Great Seal." In the absence of such authorization, however, I do not believe that it can be used and I find no statutory enactment which gives to the Department of Health this right. It is interesting to note that former legislatures have required many officers and departments to have a seal to be used by them but I know of no instance where they have authorized such officers or departments to use the "Great Seal of the State of Alabama."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 10, 1940.

Mrs. E. J. Garrison, Chairman,
Clay County Board of Registrars,
Ashland, Alabama.

Registration—A person for the purpose of registration as a voter becomes of full age on the day preceding the twenty first anniversary of his birth.

Opinion by Assistant Attorney General McCall.

Dear Madam:

I have your letter of January 6, 1940, in which you request my opinion as follows:

"Under the provisions of the present registration law, the board of registrars of Clay County will be in session at the Courthouse, for the

purpose of registering voters from the fourth Monday of this month (Jan. 22) to February 1st inclusive, ten working days (see Acts of 1927, page 274).

"A young man who was born Feb. 2, 1919, wishes to register on February 1st, 1940, claiming that he is 21 years of age on that day, and therefore entitled to register. (See *Frost v. State ex rel.* 153 Ala. at page 664, citing 15 Cyc. 290, and other authorities).

"Will you please advise me whether his construction is correct?

"Your prompt reply is desired, so that the board will know how to proceed in the matter on the first of February, 1940."

In answer to your inquiry, I call your attention to an opinion of this office appearing in Biennial Reports of the Attorney General 1934-36, p. 83, which is as follows:

"In answer to your inquiry, I beg to refer you to Sections 177 and 178 of the Constitution of Alabama of 1901. Section 177 of the Constitution provides that a person must be 21 years old or upwards before he can become an elector. Section 178 of the Constitution provides that a person must be duly registered as an elector before he is entitled to vote. In my judgment this means that only electors may be registered. To be an elector, one must be twenty-one years of age. When one has registered as an elector, the registration is decisive of the fact that he is twenty-one years of age and has the right to vote at any election held after his registration so far as age is concerned.

"In this connection, I beg to refer you to two former opinions of this office found in the Biennial Report of the Attorney General 1928 1930, pages 649 and 672." See also, Quarterly Report of Attorney General, Vol. II, p. 45.

This office has ruled that the poll list should be purged of those registered before reaching twenty-one years of age, regardless of the date of said registration. Quarterly Reports of Attorney General, Vol. I, p. 342.

In determining when a person arrives at the age of twenty-one, most states have adopted the common-law rule that one is twenty-one years old on the day preceding the twenty-first anniversary of his birth. 18 Am. Juris. 215. 22 Corpus Juris. 67.

The Supreme Court of Alabama in the case of *Frost vs. State ex rel Clements* 153 Ala. 654, 45 So. 203, speaking through Justice Denson uses the following language:

"It is insisted by the appellant, and conceded by the appellee, that a person reaches a designated age on the day preceding the anniversary of his birth. 1 Am. & Eng. Ency. Law (2d. Ed.) 827; 15 Cyc. 290, note 1; 1 Chitty on Cont. (11th Ed.) 193, note "h"; 1 Redf. on Wills, *pp. 19, 20; Paine on Elections, pp. 731, 732; 1 Blk. Com. pp. 460, 463; 3 Page on Cont. Sec. 851; 1 Salkeld, 44; 2 Salkeld, 625; Lenhart's Case, 33 Tex. Cr.

R. 504, 27 S. W. 260; *Ross v. Morrow*, 85 Tex. 172, 19 S. W. 1090, 16 L. R. A. 542; *Montoya de Antonie v. Miller*, 7 N. M. 289, 34 Pac. 40, 21 L. R. A. 699. Assuming the correctness of this insistence and concession, in legal contemplation the respondent (appellant) completed his forty-fifth year on the 1st day of October, 1906; and for this reason he contends that he was not under 45 years of age on that day, and, therefore, that he was not, under section 194 of the Constitution subject to pay a poll tax for the year of 1906, because, he says, the tax "became due and payable" on that day."

Certain phases of this case were later expressly overruled in the case of *Graves vs. Eubanks, Tax Collector*, 205 Ala. 174, 87 So. 587, however it is my opinion that the question of age was not overruled.

The Supreme Court of Kentucky in the case of *Erwin vs. Benton*, 120 Ky. 536, 87 S. W. 291 in passing on this particular question says:

"One voter was born June 9, 1883. The election was held, as stated, on June 8, 1904. Consequently the day following the election was his "birthday." The question is, when did he become 21 years old. The law does not take notice of a part of a day. Its division of time into days is to allot, say, 24 hours to the day, each day ending at midnight. So a day in law may be very much less than 24 hours. It may, of course, be less in fact than an hour, or even one minute. Where time is an element of a fact, its beginning is deemed to have been coincident with the first moment of the first day of the event. The year in law is 365 calendar days. One born on the first day of the year is consequently deemed to be one year old on the 365th day after his birth--the last day of that year. As a matter of fact, he may not be. For he may not have been born on the first moment of the first day of the year, which would have been necessary to make him one year old on the last moment of the last day of that year. So, unless the law should take notice of parts of days, it would more frequently happen that one would have to be 21 years and one day, or 21 years and some part of an additional day, old, before he could do any act permitted to be done by an adult and proscribed to a minor. For it is hardly possible that many people could prove the precise moment of their birth by any kind of evidence. This has given rise to some nice discussion as to when in law one does become 21 years old. As at that age he is a man, can make a will, enter into contracts, and vote, and bind himself and his property as an adult, the question has frequently arisen, though it seems to have been before this court but once, and there it was assumed, without discussion or citation of authority, that one is 21 years old on the day preceding the twenty-first anniversary of his birth. *Hamlin v. Stevenson*, 4 Dana, 597. The conventional fixing of 21 years, by the common law, when man's estate of full responsibility is begun, has been adopted generally where the common law has gone. It was adopted in deference to considerations of expediency similar to those upon which rest the maxim that the law takes no notice of a fraction of a day. Inasmuch as a man is a man when he is 21, he is then entitled to all the privileges, as he is charged with the responsibilities, of full age. At 21 he may lawfully do what he could after he is 21. Time is continuous, and, of course, is not in fact severable. There is no instant between the ending of one period and the beginning of the succeeding one. When 21 years have passed, the twenty-second year had begun. So, if it were said that 21 years must actually pass before one is of full age, it would follow that he would be

more than 21 in fact before he attained to the privileges which the common law gives to one who is just 21 years old. The law notes no fraction of any day. In law a man is 21 years old on the day preceding his twenty-first birthday, and may then do whatever is allowed to an adult to do. Hence one born on June 9, 1883, at 11:59 p. m., is deemed in law to have been born on the first moment of that day. By like rule, one first moment of June 8, 1904, he has encompassed 21 complete years, although, as a matter of fact, we see that he lacks 47 hours and 58 minutes of having done so. This illustrates one extreme of the possibilities of the rule. But it is supported by the great majority of the adjudged cases; indeed, the courts seem quite unanimous on the point. 1 Bl. Com. p. 463; Bingham's Infancy, p. 2; Ross v. Morrow, 85 Tex. 172, 19 S. W. 1090, 16 L. R. A. 542; Wells v. Wells, 6 Ind. 447; Bardwell v. Purrington, 107 Mass. 419, 425; State v. Clarke, 3 Har. 557, ***."

The State of Alabama having adopted the common-law so far as not inconsistent with the Constitution and Laws of this state, I am of the opinion that a person for the purpose of registration as a voter becomes of full age on the day preceding the twenty first anniversary of his or her birth.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 11, 1940.

Dr. J. N. Baker,
State Health Officer,
Montgomery, Alabama.

State Health Department, not receiving all of its funds out of the General Fund, required to pay cost of audit and examination of its records under Act No. 445, H. B. 491, approved September 15, 1939.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of December 11, 1939, in which you request my opinion as follows:

"In connection with an examination and audit of the records and accounts of this department, my attention has been called to Act No. 445, approved September 15, 1939, which provides in part that when the records and accounts of any officer, department, board . . . of the State of Alabama, who or which does not receive all of his or its funds or revenues from the General Fund of the State of Alabama, are examined and audited by the Department of Finance or any Division thereof . . . the cost of said examination and audit shall be a charge against the funds or revenues of the officer, department, board . . . whose records and accounts are examined and audited."

"The State's appropriation of \$430,000 to this department comes in its entirety from the General Fund (see Act No. 247, approved August 24, 1939.). It is true that certain other funds are made available by the Children's Bureau of the federal government and the United States Public Health Service, which funds, having been deposited in the State Treasury, are disbursed by this department for general health purposes throughout Alabama.

"In view of the fact that all of the monies made available by the Legislature of Alabama for the operation of the work of the State Department of Health are derived entirely from the General Fund, question exists in my mind as to the liability of the department to meet the cost of the examination and audit referred to.

"It will be appreciated if you will give me your opinion in the matter."

In answer to your inquiry, I call your attention to Section 1 of Act No. 247, S. 239, approved August 24, 1939, which provides in pertinent part as follows:

"That there is hereby appropriated for the ordinary expenses of the Executive and Judicial Departments of the State, for the interest on the public debt, and for the public schools for each of the four fiscal years ending respectively September 30, 1940, September 30, 1941, September 30, 1942, and September 30, 1943, **to be paid out of any monies in the State Treasury not otherwise appropriated, the several sums of money hereinafter specified or so much thereof as may be necessary.** *** .
VII. CONSERVATION OF HEALTH AND SANITATION: 1. Health Department: For compensation of State Health Officer \$3600.00. For salaries, for other expenses and for pasteur treatments \$223,500.00. For contribution to county health units \$202,900.00. For subsidy to counties for the treatment of tuberculosis \$75,000.00, \$505,000.00. For other expenses conditional upon the approval of the Governor, \$25,000.00 *** "

Your attention is further called to Section 1 of Act No. 445, H. B. 491, approved September 15, 1939, which provides:

"Section 1. That when the records and accounts of any officer, department, board, bureau, commission, institution, agency or public corporation of the State of Alabama, who or which does not receive all of his or its funds or revenues from the General Fund of the State of Alabama, are examined and audited by the Department of Finance or any Division thereof in the manner provided in the 'Department of Finance Act of 1939,' approved March 7, 1939, the cost of said examination and audit shall be a charge against the funds or revenue of the officer, institution, agency or public corporation of the State of Alabama whose records and accounts are examined and audited."

It is my opinion that Act No. 445, supra, requires that all departments who receive funds such as you receive from the Federal Government must pay to the Department of Finance the cost of the examination and audit of the books and records of the department. This is true, in my judgment, regardless of the fact that the funds received from the Federal Government must be used for designated purposes other than for the payment of the

cost of such an examination. A careful reading of Act No. 445, supra, to my mind, clearly discloses that the Legislature divided the officers, departments, boards, bureaus, commissions, institutions, agencies, and public corporations of this state into two distinct classes insofar as the payment of the cost of the examination and audit of their books and records are concerned, first, those who receive all of their funds or revenues from the general fund of the state and, second, those who receive some of their funds or revenues from other sources. It is the latter class in which your department falls, and I am, therefore, of the opinion that said Act No. 445, supra, is controlling.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 11, 1940.

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Poll tax—Reserve officers of United States Army not exempt from payment of poll tax.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of December 20, 1939, in which you request my opinion as follows:

“Will you please give me a ruling on whether U. S. Reserve Officers have to pay poll tax. I would appreciate it greatly if you will do this as soon as possible as we have inquiries every day on the subject, and they want to pay poll tax before the time is up if this does not exempt them.”

In answer to your inquiry, I call your attention to Amendment XIV to the Constitution of Alabama of 1901, which provides as follows:

“No person who honorably served in the Military or Naval service of the United States, between January 1st, 1917, and November 11, 1918, shall be required to pay the poll tax mentioned in the Constitution of Alabama; such persons shall be exempt from the payment of all poll taxes which have accrued or may hereafter accrue. This section shall be self-executing and retroactive. The Judge of Probate shall issue certificates of exemption from the payment of such poll taxes to the persons entitled thereto under such rules and regulations as may be prescribed by the Governor.”

Your attention is further called to Section 4 of Act No. 509, H. B. 773, approved September 22, 1939, which amends Section 11 of the Military Code of Alabama, 1936 (Act No. 143, H. B. 63, approved April 22, 1936, General and Local Acts, Extra Session, 1936, p. 105) which provides in part:

"Owing to liability to call for military duty during their term of service, every officer and enlisted man of the National Guard and Naval Militia of Alabama shall be exempt from poll tax, *** during his active membership, any local or special laws to the contrary notwithstanding; ***. The commanding officer of any company, troop, battery or any similar organization, shall furnish each member of his command applying for same such certificate of membership as may be prescribed by the Adjutant General, signed by such commanding officer, which certificate shall be accepted by any court as proof of exemption as provided by this law. Such certificates shall be issued to every officer and enlisted man, as aforesaid, under such Regulations and upon such forms as may be prescribed and provided by the Adjutant General. The said certificates shall be effective, as to poll tax, for the poll tax year for which same is issued without regard to dates prescribed for payment of poll tax, ***."

It will be observed that this Act exempts only officers and members of the national guard of the State of Alabama.

I do not find any provision of law that exempts Reserve Officers of the United States Army from the payment of poll tax. Biennial Report of Attorney General, 1928-30, page 731.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 11, 1940.

Hon. William E. Persons, Director,
Department of Corrections and Institutions,
Capitol.

States—Department of Corrections and Institutions—Acquisition
of lands—

Department of Corrections and Institutions may enter into what is commonly referred to as a "lease-sale contract" for the acquisition of lands, provided such contract does not bind the State of Alabama to purchase the lands, and the contract may be terminated, without liability to the State of Alabama at any time, without creating a debt prohibited by Section 213 of the Constitution of Alabama of 1901, as amended.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 29, 1939, in which you request my opinion as follows:

"The Department of Corrections and Institutions is desirous of acquiring certain lands for use by it in connection with the farms operated by the Department. It is contemplated that this land will be acquired under what is commonly referred to as a 'lease-sale contract', that is, the State will rent the land for a stipulated price per year for a certain number of years with the understanding that it may purchase the same at any time during the life of the contract for an agreed price, with the amount of the annual rentals paid before the time of purchase being applied to the purchase price agreed upon.

"Your opinion is requested as to whether or not the Department of Corrections and Institutions has the legal authority to enter into such a contract for the acquisition of land. More particularly, would such a contract amount to the creation of a debt prohibited by Section 213 of the Constitution of Alabama of 1901?

"If such a contract provides that it may be terminated at any time by the Department of Corrections and Institutions, and contains only an option to purchase, instead of an agreement to purchase, would it create a debt prohibited by the above mentioned section of the Constitution?

"In connection with this request, permit me to respectfully call your attention to the following opinions of your office:

"To Hon. W. M. Vaughn, Probate Judge, Dallas County, Selma, Alabama under date of October 7, 1936, Quarterly Report of the Attorney General, Volume 5, page 26; and to Dr. J. A. Keller, Superintendent of Education, State of Alabama, Montgomery, Alabama, under date of July 26, 1937, Quarterly Report of the Attorney General, Volume 8, page 23, Biennial Report of the Attorney General 1936-38, page 290."

The first questions that present themselves are whether or not the Department of Corrections and Institutions has the legal authority (1) to purchase or (2) to lease lands for use by it in connection with farms operated by the department. Express statutory authority for the department purchasing lands for use by it in connection with the farms operated by the department is contained in Section 3586 of the Code of Alabama, 1923, which reads as follows:

"Section 3586. Powers of board of administration to sell and purchase agricultural lands.—The state board of administration, with the approval of the governor, may sell any or all of the lands now used by the state in working convicts, for cash or on credit, as may seem best, and purchase lands superior in quality, to be used by the department in working convicts."

The powers, functions and duties of the State Board of Administration relating to the administration, operation, supervision and control of the

penal and correctional institutions of the State were transferred to and conferred upon the State Department of Corrections and Institutions to be exercised by that department in the manner specified in the act so transferring the same. Act No. 91, H. 261, approved March 1, 1939, and particularly Section 4 thereof.

It is my judgment that the above statutory authority which is now vested in the Department of Corrections and Institutions to purchase lands to be used by the department in working convicts includes the authority to lease such lands. In an opinion rendered to Hon. Walter B. Jones, State Geologist, University, Alabama, under date of June 28, 1935, Office Edition Vol. 4-A, page 236, we dealt with the authority of the State Forester to lease certain lands in the name of the State of Alabama. After stating in the opinion that he could not so act unless legislative authority had been given to him to perform such acts, we quoted from H. B. 81, approved February 5, 1935, a part of which quotation is as follows:

"The Commission, for the purpose of establishing, developing and maintaining State Forests and State Parks may acquire land by donation, **purchase** or condemnation and for these purposes may use such funds as may be available to it and not otherwise obligated, *** " (Emphasis supplied)

We then spoke to the question of whether this statutory provision included the authority to lease lands in the following language:

"The leases cannot be construed to come within the terms of donation, as consideration must be given. They could not be included in the term, **condemnation**, for condemnation involves an involuntary act on the part of the owner of the property. The leases, then, if included in the terms of this part of this Act at all must come within the meaning of the word, **purchase**. The word **purchase** has been defined in 51 C. J., page 94 as follows:

"In its technical and larger sense, all lawful acquisition of real estate by any means whatever, except by descent; *** the acquisition of property by a party's own act as distinguished from acquisition by act of law. *** In its technical, broader sense, it means to acquire (real estate) by any means whatever other than descent or inheritance. *** There is still another sense in which the word may be used, namely, procuring; "to lease".'

"I further refer you to **Smoot vs. Lecatt**, 1 Stewart 590, an Alabama case which holds: 'The term, "purchase" is appropriate to a lease.' In Words and Phrases Fourth Series, Volume 3, page 285, the following definition is given to the word, **purchase**: 'The word purchase in a technical and broader meaning, relative to land, generally means the acquisition of real estate by any means whatever except descent.'

"And:

"Descent and purchase are the only modes of acquiring title, "purchase" including every mode of acquisition known to the law except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by act of the law.'

"In my opinion, the word **purchase** as used in the act above referred to includes **lease** and the Forestry Commission would have authority to execute the leases in question for the purpose of State Forests or State Parks."

Consequently, it is my opinion that Section 3586, *supra*, invests the Department of Corrections and Institutions with authority to either purchase or lease lands for use by it in connection with farms operated by the department.

The only question then remaining is whether or not what is commonly referred to as a "lease-sale contract" for the acquisition of such lands entered into by the Department of Corrections and Institutions would create a debt prohibited by Section 213 of the Constitution of Alabama of 1901, as amended.

In my opinion, the Department of Corrections and Institutions may enter into what is commonly referred to as a "lease-sale contract" for the acquisition of such lands, provided such contract does not bind the State of Alabama to purchase the lands, and the contract may be terminated without liability to the State of Alabama at any time, without creating a debt prohibited by Section 213 of the Constitution of Alabama of 1901, as amended. Said section, as amended, reads as follows:

"After the ratification of this Constitution, no new debt shall be created against, or incurred by the State, or its authority except to repel invasion or suppress insurrection, and then only by a concurrence of two-thirds of the members of each House of the legislature, and the vote shall be taken by yeas and nays and entered on the journals; provided, the Governor may be authorized to negotiate temporary loans, never to exceed Three Hundred Thousand Dollars, to meet the deficiencies in the Treasury, and until the same is paid no new loan shall be negotiated; (provided, further, that this section shall not be so construed as to prevent the issuance of bonds for the purpose of refunding the existing bonded indebtedness of the State. Provided, further, that this Section shall not be construed as to prevent the Governor from paying interest at the rate of not exceeding 5% per annum, payable semi-annually from July 1, 1933, on the floating indebtedness of the State at the close of business on September 30, 1932, as shown by outstanding and unpaid warrants drawn on the Treasury, as provided by law, amounting in the aggregate to \$16,943,357.12 and items enumerated in an Act of the Legislature number 294, being Senate Bill 272, approved November 9, 1932, all of which are hereby ratified and confirmed.) All warrants and/or instruments issued or to be issued representing such indebtedness shall be a direct obligation of the State, and for the prompt and faithful payment of the principal and interest thereon, the full faith and credit of the State is hereby irrevocably pledged, and such warrants and/or instruments shall be exempt forever from all taxes of every kind. Any Act creating or incurring any new debt against the State, except as herein provided for, shall be absolutely void. To create a sinking fund for the prompt and faithful payment of the floating indebtedness of the State, and interest thereon, the net proceeds of any income tax which may be levied by the Legislature pursuant to law is hereby pledged. To prevent future deficits in the State Treasury, it shall be unlawful from and after the adoption of this amendment for the State Comptroller of the State of Alabama to draw any warrant or other order for the payment of money belonging to, or administered by, the State of Alabama upon the State Treasurer, unless there is in the hands of such Treasurer money appropriated and available for the full payment of the same.

In case there is, at the end of any fiscal year, insufficient money in the State Treasury for the payment of all proper claims presented to the State Comptroller for the issuance of warrants, the Comptroller shall issue warrants for that proportion of each such claim which the money available for the payment of all of said claims bears to the whole, and such warrants for such prorated sums shall thereupon be paid by the State Treasurer. At the end of each fiscal year all unpaid appropriations which exceed the amount of money in the State Treasury subject to the payment of the same after the proration above provided for, shall thereupon become null and void to the event of such excess. Any person violating any of the provisions of this amendment shall, on conviction, be punished by a fine of not exceeding Five Thousand Dollars, or by imprisonment in the penitentiary for not more than two years, one or both, at the discretion of the jury trying the same, and the violation of any of the provisions of this amendment shall also be ground for impeachment."

In the opinion to Judge Vaughan referred to in your letter of inquiry the question under consideration was stated as follows:

" 'The City of Selma proposes to build a new City building, and provide a jail for County prisoners on the third floor, which is the top floor. The City proposes to sell us this jail (third floor) for a reasonable consideration, payable yearly. The yearly payments are to be provided for in our annual budget. The County shall be under no legal obligation to make any payments except for the current fiscal year it occupies the building, but may quit the premises, without further obligation, at the end of any fiscal year. At the end of twenty years, the City will convey the jail to the County, if payments are kept up.

" 'As we see it, this proposition involve only the right of the County to purchase a jail, and does not create any debt whatever, except the actual annual payment.

" 'Please advise your conclusion as to this proposition and oblige.'

"In a previous letter relative to this matter you stated that 'Dallas County's bonded indebtedness at this time (due to the lowering of tax valuation in the past five years) is in excess of the constitutional debt limit.' I assume, therefore, that the purpose of your present request is to ascertain if, in my opinion, your proposed plan creates a debt within the meaning of Section 224 of the Constitution."

After pointing out the mandatory duty on Dallas County to provide adequate jail facilities, we conclude that under the facts stated such a contract did not create a debt against the county within the meaning of Section 224 of the Constitution. In that opinion it was stated:

"You stated 'the county shall be under no legal obligation to make any payments except for the current fiscal year it occupies the building, but may quit the premises without further obligation at the end of any fiscal year.' It is manifest therefore, that the county is not obligated to pay any sum beyond the current fiscal year * * * ,"

In the opinion to Dr. Keller, referred to in your letter of inquiry, it was held:

"Boards of Education may make lease for bus bodies and chassis extending over a period beyond the current year, provided Board of Education is not legally bound to continue payments beyond current year."

In that opinion it was stated:

"The ordinary lease sale contract, in my opinion would not constitute a loan as referred to in Section 9 of the Act. See **Commercial Credit Company v. Tarwater**, 215 Ala. 123, 110 So. 39. If the lease contract is so drawn that the county board of education is obligated to pay the full amount of the contract over a period of four years, it may violate the other provisions of Act No. 300 above set out. On the other hand, if the lease contract is so drawn that at any time the board of education fails to meet the payments of rental, all rights and liabilities under the contract cease, in my opinion, such a contract would be legal and would not violate any of the provisions of the Act above referred to (Act No. 300, S. 351, approved September 2, 1935, General Acts, 1933, p. 728, providing for a budget system for county and city school systems and requiring said systems to live within the budget). In this connection, I refer you to the opinion to Hon. W. M. Vaughn set out in Vol. V, Quarterly Report of Attorney General, page 26, in which an analogous arrangement for the purchase of a jail was approved by this office."

In my judgment, the reasoning of those opinions is equally applicable to the instant question. If the so-called "lease sale contract" which you desire to enter into for the acquisition of land to be used in connection with the farms operated by your department contains a proviso that it may be terminated at the end of any year without further liability on the part of the State and does not bind the State to the payment of the annual rental except for the years the State elects to use the land, and does not bind the State to purchase the land but merely gives the State an option to purchase at any time during the life of the contract for an agreed price, with the amount of the annual rentals paid before the time of purchase being applied to the purchase price agreed upon, then, in my judgment, the contract would not amount to the creation of a debt prohibited by Section 213 of the Constitution of Alabama of 1901, as amended, *supra*, and I so advise you.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 12, 1940

Hon. Thos A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Ala.

Electors—Registration—

Applicant for registration must be twenty-one years of age or more at the time of registration.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of January 8, 1940, in which you request my opinion as follows:

"Please advise me if a person that will become 21 before the May Primary can register at our next registration?

"Our next registration will be held Feb. 22, and continue for ten days."

In reply to your inquiry I call your attention to an opinion of this office appearing in Biennial Report of Attorney General 1934-36, p. 83, which holds in pertinent part as follows:

"In answer to your inquiry, I beg to refer you to Sections 177 and 178 of the Constitution of Alabama of 1901. Section 177 of the Constitution provides that a person must be 21 years old or upwards before he can become an elector. Section 178 of the Constitution provides that a person must be duly registered as an elector before he is entitled to vote. In my judgment, this means that only electors may be registered. To be an elector, one must be twenty-one years of age. When one has registered as an elector, the registration is decisive of the fact that he is twenty-one years of age and has the right to vote at any election held after his registration so far as age is concerned.

"In this connection, I beg to refer you to the two former opinions of this office found in the Biennial Report of the Attorney General 1928-30, pages 649 and 672."

This holding was followed on January 14, 1936, in an opinion to Mrs. Jessie W. Nunnelee, Chairman of the Board of Registrars, Montgomery County.—Biennial Report of Attorney General, 1934-36, page 463.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 15, 1940.

Hon. Harry E. Smith, Sheriff,
Jefferson County,
Birmingham, Alabama.

1. Judge of an inferior court possessing the same powers in regard to preliminary hearings as a justice of the peace is without authority to approve bond in case where defendant has been indicted by a grand jury.

2. Judge of an inferior court possessing the same powers in regard to preliminary hearings as a justice of the peace under the provisions of Section 5238, Code of Alabama, 1923, may approve bond of a defendant who has been bound over by him to await the action of the grand jury, where the defendant has not been delivered to the sheriff.

3. Judge of an inferior court possessing the same powers in regard to preliminary hearings as a justice of the peace is without authority to approve bond in case where defendant has been bound over by him to await the action of the grand jury and he has endorsed on the commitment the amount of bail and the defendant has been turned over to the sheriff.

Opinion by the Attorney General.

Dear Sir:

I have your letter of recent date, in which you request my opinion as follows:

"Will you please furnish me an official opinion dealing with the right of judges to approve appearance bonds under the following Code Section?

" 'Section 3362. **Prisoners entitled to opportunity to give bail**—All judges shall take care that every prisoner in jail shall have an opportunity to give bail, in cases in which the prisoner is entitled to bail, and may approve any bond presented to him at any time, which in his judgment is reasonably good, and may in his discretion release on his own recognizance any prisoner charged with a misdemeanor.'

"I wish this opinion on the following hypothetical cases:

"1. Can the Judge of the Jefferson County Court of Misdemeanors, and other inferior courts created in lieu of Justice of the Peace Courts approve appearance bonds in the following cases:

A. Where the defendant has been bound over to await the action of the Grand Jury by the judge of said court, can he approve a bond returnable to the Circuit Court to answer an indictment.

"B. Where the Grand Jury has returned an indictment and the defendant is required to make bond returnable to the Circuit Court to answer said indictment, can the judges of the above mentioned courts approve that appearance bond?"

It is my opinion that Section 3362, Code of Alabama 1923, which was quoted by you in your letter set out above, does not in any way broaden the powers of a justice of the peace or the powers of a judge of an inferior court with the same powers which a justice of the peace has in regard to preliminary hearings. It is to be noted that said Section 3362 is new to the Code of 1923. It was first enacted into law as Section 14 of Act No. 712, Senate Bill 545, approved September 25, 1915 (General Acts, 1915, pages 809, 812). Said Act No. 712, supra, was entitled "An Act to further prescribe and regulate the qualifications, number, designation, duties, and powers of the circuit judges of the state, and to provide for their election and appointment." A careful reading of the act will disclose that each and every section thereof deals with the powers, functions and duties of the circuit judges of the state.

I am aware of the fact that the Court of Appeals, in the case of *Ex Parte Owsley*, 22 Ala. App. 619, 118 So. 675, has in effect construed Section 3362 to apply to probate courts. This case, however, was not carried to the Supreme Court of Alabama on a petition for writ of certiorari. It is my opinion, however, that the *Owsley* case cannot be taken as authority for the position that Section 3362 gives to a justice of the peace court or a court of similar jurisdiction in so far as preliminary proceedings are concerned, the power and authority to approve bonds commensurate with the judges of the circuit courts of this state.

I am, therefore, of the opinion that your second inquiry must be answered in the negative. I do not believe that the judge of the Jefferson County Court of Misdemeanors, assuming he has only the same powers in regard to preliminary hearings as a justice of the peace, can approve an appearance bond in a case where the grand jury has returned an indictment and the defendant is required to make a bond returnable to the circuit court to answer said indictment.

Your first inquiry presents a more difficult question. I do not believe that Section 3362 can be construed as authority to allow the judge of said Jefferson County Court of Misdemeanors to approve the bond in a case where he has bound a defendant over to await the action of a grand jury.

An answer to your question, however, in my opinion necessitates a consideration of the inherent powers of a judge to admit the defendant to bail in a case tried before him. The general rule is stated in 6 Corpus Juris 973 to be as follows:

"It may be stated as a general rule that where, under the statutes, justices of the peace have power as examining magistrates, with power of commitment, they may in their discretion admit to bail. But, where the power of a justice or of justices of the peace to take bail is limited by the constitution, or by statute, they must act within the express or implied limitations thereby laid down; * * *."

Consideration, then, must be given to the statutory provisions of this state dealing with the powers of justices of the peace when acting as committing magistrates. Section 5238, Code of Alabama, 1923, which is a part of Article 3 of the Code of Alabama, 1923, entitled "Preliminary Examination and Its Incidents," is as follows:

"Section 5238. If probable cause shown, discharged on bail, or committed.—If it appears that an offense has been committed, and that there is probable cause to believe that the defendant is guilty thereof, he must be discharged, if the offense is bailable, upon giving sufficient bail but if sufficient bail is not given, or if the offense is not bailable, he must be committed to jail by an order in writing.

I have been unable to find any decisions of the appellate courts of this state which construe the above quoted statutes in the light of the inquiry here presented. In an opinion of this office, reported in Quarterly Report of Attorney General, Vol. II, at pages 118, 133, and 134, released during the term of my predecessor in office, it was held that a justice of the peace must approve a bond in a case where a defendant had been committed to await the action of the grand jury and has not been turned over to the sheriff. This conclusion is based on a consideration of Section 5238, *supra*. It is by inference held that where the defendant has been turned over to the sheriff and the magistrate has endorsed on the commitment the amount of bail required, that the duty of approving the bond rests solely on the sheriff of the county.

I am frank to admit that there is some doubt in my mind about the correctness of these conclusions, but in view of the fact that I cannot find where the Supreme Court of this state has ever passed on this question, I am constrained to follow the opinion heretofore rendered by this office and, therefore, hold, first, that a committing magistrate possessing only the powers given to him under the general law of this state may approve a bond in a case where a defendant is bound over to await the action of a grand jury before said defendant is turned over to the sheriff. Second, that such committing magistrate is without authority to approve the bond in a case where the amount of the bond has been fixed and endorsed on the commitment and the defendant delivered to the sheriff.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 15, 1940.

Hon. Paul Roy Brown,
Superintendent of Education,
Walker County,
Jasper, Alabama

County board of education held authorized to pay purchase price of gasoline in which is included the amount of tax imposed by municipal ordinance on the seller.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 4, 1939, in which you request my opinion as follows:

"The City Council of Jasper has duly passed an ordinance upon which there is levied a license tax upon gasoline of $\frac{1}{4}$ of one cent on each gallon of gasoline sold or delivered and withdrawn from the storage of the wholesale dealer. The particular clause in the ordinance which the school board is interested in is as follows:

" 'For the year 1938 and each succeeding year thereafter in addition to the license tax now charged, every wholesale distributor or dealer of gasoline as above defined who has storage tanks within the City of Jasper, Alabama, shall pay a license to the City of Jasper, Alabama, and a license is hereby fixed and created, which license tax shall be the sum and amount equal to $\frac{1}{4}$ ct on each and every gallon of gasoline sold or delivered by such distributors, seller or dealer, within the corporate limits of Jasper, Alabama, or that passes through its storage tank by being delivered therein and taken therefrom for distribution or sale in Walker County, Alabama.'

"The County Board of Education buys a considerable quantity of gasoline which is withdrawn from the storage tank of the wholesaler. The dealer from whom the Board buys its gasoline renders a bill to County Board and adds thereto or thereon the amount of said tax which he has paid the City of Jasper.

"The County Board of Education under section 868 desires an opinion or answer to the following question, namely:

"Where the dealer from whom the County Board of Education of Walker County purchased gasoline adds to the bill $\frac{1}{4}$ of one cent per gallon as a part of the bill, being the amount of gasoline tax levied by the City of Jasper on said dealer, is said gasoline tax so charged by said dealer to the Board a lawful charge? That is to say, is the Board of Education being a part of the county government, liable for the payment of said tax?"

In reply, I wish to advise that the answer to your question should be in the affirmative.

The tax here considered is imposed upon the dealer and not upon the county board of education. In my judgment, no provision of law prevents the dealer from charging as a part of the purchase price the amount of city tax formerly paid by him on gasoline sold to the county board of education. I wish to refer you to the case of *State v. City of Montgomery*, 228 Ala. 93, 151 So. 856, wherein the court, discussing a related question, said:

"The general rule is that when a tax levy is laid in general terms with nothing to indicate that it was intended to apply to a city or county, it will be held not so to apply. **Huntsville v. Madison County**, 166 Ala. 389, 52 So. 326, 139 Am. St. Rep. 45; **Van Brocklin v. Anderson**, 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 845. **There is no infringement of this principal to hold that when a city buys gasoline from a dealer who is subject to the tax, the amount of it should not be deducted. The tax is imposed on the dealer and not on the city in that transaction. though it incidentally is paid in the amount of the purchase price. Orange State Oil Co. v. Amos**, 100 Fla. 884, 130 So. 707." (Emphasis supplied).

Premises considered, it is therefore my opinion that the dealer in question may charge and that the County Board of Education may pay the tax here included in the purchase price of the gasoline.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 16, 1940.

Hon. G. W. Robertson,
Judge of Probate,
Baldwin County,
Bay Minette, Alabama.

Licenses—Motor Vehicles—

Person owning motor vehicle prior to November 15th not entitled to license on monthly declining basis even though motor vehicle was not brought into the State of Alabama nor operated on the highways thereof prior to the date on which application is made for license.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 10, 1940, in which you request my opinion as follows:

"We frequently find ourselves facing the question of whether an automobile, acquired by a tag applicant prior to November 15, and while a resident of another state, should be required to purchase a full years tag or a ½ years tag (depending upon his date of arrival within the State of Alabama), and should be deprived of the privilege of purchase on the so called 'Monthly Decline Basis'.

"On the strength of your opinion under date of March 29th, 1939, to the Hon. J. S. Benson, Judge of Probate of Jackson County, we

have been insisting that they buy on the basis of a full year, or half year, and have withheld from them the privileges of the Monthly Decline.

"In view of the fact that as the matter now stands, vagarities do exist on this point, I would very much appreciate your advising me specifically on the point aforementioned so that we may act exactly in accord with that which is just and right and to the proper interest of all concerned parties."

You are advised that you have correctly interpreted the opinion of this office rendered to Hon. J. S. Benson, Judge of Probate, Jackson County, Scottsboro, Alabama, under date of March 29, 1939, Quarterly Report of the Attorney General, Vol. XIV, page 269. I quote from the Benson opinion as follows:

"You will note that in the opinion to Judge Hill, this office specifically held that a party possessed of an automobile on or prior to November 15th was not entitled to purchase license on a monthly declining basis, even though said automobile was not operated on the highways during the license year, either prior or subsequent to November 15th, until application was made for the license. Insofar as the opinions to Hon. Eugene B. Henry, Jefferson County, dated April 21, 1937 (Quarterly Report of Attorney General, Vol. VII, page 45) to Hon. F. B. Thompson, Judge of Probate, Clay County, dated February 7, 1938 (Quarterly Report of Attorney General, Vol. X, page 77) and to Hon. Wm. W. Hill Judge of Probate, Montgomery County, dated February 19, 1938 (Quarterly Report of Attorney General, Vol. X, page 98), conflict with the holding of the Hill opinion dated February 26, 1937, the same are hereby overruled, it being the judgment of this office that where a party is possessed of any motor vehicle on or prior to November 15th, regardless of whether same is being operated or not, the section of the Revenue Law providing for obtaining a license on a monthly declining basis is not applicable." (Emphasis supplied).

Cf. opinion to Hon. C. B. Gullatt, Jr., Judge of Probate, Russell County, Seale, Alabama, under date of August 14, 1939, Quarterly Report of the Attorney General, Vol. XVI, page 148.

In this connection your attention is called to the opinion to Hon. L. W. Price, Judge of Probate, Connecuh County, Evergreen, Alabama, under date of November 8, 1939, a copy of which previously has been furnished to you, construing Schedule 158.17 of Section 348, Chapter 6 of Article XIII of the 1935 Revenue Act, as amended by Act No. 212, H. 104, approved August 8, 1939, in which we held that a person otherwise entitled to purchase a license on a monthly declining basis could not now do so until December 15th. However, this schedule, as amended, supra, did not alter the provisions of our statutory law to the effect that in order for a person to be entitled to purchase a license for a motor vehicle on a monthly declining basis, he must have purchased or acquired the motor vehicle subsequent to November 15th, in any way whatsoever.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 16, 1940.

Hon. H. W. Nixon,
State Toxicologist,
Auburn, Alabama.

States—The State Toxicologist—

Entitled to reimbursement for all actual expenses necessarily incurred by him while traveling on official business.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 10, 1940, in which you request my opinion as follows:

"Please refer to Section 5 of Act. No. 225, H. 425, approved July 12, 1935, as amended by Act. No. 440, H. 218, approved September 21, 1939, and advise me on the following:

"Is the State Toxicologist entitled to reimbursement for all actual traveling expenses necessarily incurred by him while traveling on official business, or is he limited in the amount which he may be reimbursed for such expenses so incurred to \$3.00 per day by the provisions of the so-called McGowin Act of 1933?"

In my opinion, your inquiry should be answered in the affirmative, that is, you are entitled to be reimbursed for all actual expenses necessarily incurred by you while traveling on official business, and you are not limited in the amount which you may be reimbursed for such expenses so incurred to \$3.00 per day by the provisions of the so-called McGowin Act of 1933.

The McGowin Act, which is Act No. 87, H. 6, approved March 23, 1933 (General Acts, 1933, p. 81), provides:

"Section 1. The maximum amount allowable to persons traveling in the services of the State of Alabama or any of its agencies or institutions for expenses other than actual expenses of transportation shall be \$3.00 per diem."

This Act controls the expense allowances of persons traveling in the service of the State, or any of its agencies or institutions, unless there are later acts relating to certain State agencies or institutions which effect a repeal of same in so far as those certain agencies or institutions are concerned.

However, Section 5 of Act No. 225, H. 425, approved July 17, 1935, General Acts, 1935, page 616, as amended by Act No. 440, H. 218, approved September 21, 1939, reads as follows:

"Section 5. The compensation of the State Toxicologist shall be Four Thousand Dollars per annum, such salary to be payable monthly

by warrants drawn on the State Treasurer by the State Toxicologist. **The State Toxicologist shall be furnished with an office and laboratory at the expense of the State, and shall also be allowed all necessary expenses for the equipment and conduct of his office and laboratory, including stenographic and laboratory assistance, and such expenses as may be incurred from traveling within or without the State for the purpose of carrying out the provisions of this Act.** Such expenses are to be paid by warrants approved by the Governor." (Emphasis supplied).

It can be readily seen that Act No. 87, supra, is in conflict with the quoted excerpts from Section 5 of Act No. 225, as amended, supra, and it necessarily follows, therefore, that Section 5 of Act No. 225, as amended, supra, being the last expression of legislative will on this subject, controls, and the provisions of Act No. 87, supra, are repealed in so far as they affect the State Toxicologist. Consequently, the State Toxicologist is entitled to be reimbursed for all actual expenses necessarily incurred by him while traveling on official business, in accordance with the provisions of Section 5 of Act No. 225, as amended, supra.

Cf. Opinions to Hon. Asa Rountree, Jr., State Director of Airfield Development, Aviation Commission, Montgomery, Alabama, under date of November 22, 1939, and to Hon. D. Trotter Jones, Chairman, Alabama Boxing and Wrestling Commission, Post Office Box 1069, Montgomery, Alabama, under date of December 7, 1939, copies of which are herewith enclosed for your information and the opinions therein cited.

Your attention is called, however, to the fact that pursuant to the provisions of Section 820 of the Code of Alabama, 1923, all claims for traveling expenses incurred by one traveling in the service of the State or any of its institutions or agencies must be itemized, verified by affidavit, with vouchers therefor attached, before the Comptroller can lawfully issue a warrant in payment of the same. See opinion to Hon. B. P. Singleton, State Comptroller, Capitol, under date of April 22, 1939, Quarterly Report of Attorney General, Vol. XV, page 53.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 16, 1940.

Hon. F. M. Shamblin,
Tax Assessor, Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—Homesteads—

Property held in trust by trustee for beneficiary, which is occupied by beneficiary as a homestead under trust indenture, is subject to homestead exemption.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 6, 1940, in which you request my opinion as follows:

"I will very much appreciate it if you will promptly give me your opinion on the following:

"Mr. Beverly P. Head of Tuscaloosa, Alabama, died in 1938, leaving a last Will and Testament. At the time of his death Mr. Head owned and occupied a home, in the City of Tuscaloosa, Alabama. Under and by his last Will and Testament Mr. Head devised this homestead, together with other property owned by him, to his wife, Charlotte B. Head, a son, Beverly P. Head, Jr., and The First National Bank of Birmingham, as Trustees. The Trust Estate under the provisions of the Will is to be held and managed by the Trustees for the benefit of the said Charlotte B. Head, the widow of Mr. Head, for and during the term of her natural life, and after her death, under certain conditions is to continue to be held, controlled and managed by the Trustees for the benefit of his children.

"The Will specifically provides that Mrs. Head be permitted to occupy the said homestead as her home so long as she lives, or until such time as she desires to release her right to so occupy the said home. Mrs. Head and the children of herself and Mr. Head have continuously occupied this home since the death of Mr. Head, as their homestead, and it is the intention of Mrs. Head to so continue to occupy the same.

"The legal title to this property is, of course, in the Trustees.

"Under the above stated facts, can the homestead exemption for ad valorem tax purposes be allowed in assessing this homestead for taxation?"

I am of the opinion that your inquiry should be answered in the affirmative.

As a general rule an absolute ownership fee is not necessary in order to establish a homestead in land, but any interest in land, coupled with the requisite occupancy, is sufficient to support a homestead exemption. 89 A. L. R. 512, and cases cited. Alabama follows this general rule. See 11 Ala. Digest 204—Homesteads, Key no. 81. The homestead laws protect a possession held under an equitable as well as under a legal title. 89 A. L. R. 526. *Tyler v. Jewett*, 82 Ala. 93, 2 So. 905; *Reeves v. Peterman*, 109 Ala. 366, 19 So. 512. See also *Biennial Report of Attorney General*, 1936-38, page 298; *Quarterly Report of Attorney General*, Vol. VIII, page 62; *Quarterly Report of Attorney General*, Vol. VII, page 68.

The equitable title or interest in trust property of the beneficiary of the trust, expressed or implied, will support a claim of homestead. 89 A. L. R. 528, 529, and cases cited.

Applying the above to the facts in the instant case, it follows that the homestead exemption under Act No. 107, S. 5, approved February 20, 1937 (General Acts, 1936-37, page 113), should be allowed. The widow of the deceased, who is in actual occupancy of the home in question as a homestead, has such an equitable and beneficial interest therein under the trust to warrant the allowing of the exemption. This is true, although the legal title may be in the trustee. The exemption should be allowed irrespective of the person to whom the property is assessed. **Quarterly Report of Attorney General, Vol. VIII, page 62, supra.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 16, 1940.

Hon. G. W. L. Smith,
County Attorney, Escambia County.
Brewton, Alabama.

Sheriffs—Sheriff is merely discharging his duty in arresting and prosecuting persons unlawfully riding on trains in his county, and neither the court of county commissioners nor the Attorney General have any authority to stop the sheriff from so discharging his duty.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 9, 1940, in which you request my opinion as follows:

“Re: Escambia County, Alabama.

“1st.—Under Order No. 5, adopted January 8th, 1940, the Court of County Commissioners of Escambia County, Ala., have requested me to write you this letter, and obtain your reply as early as possible.

“2nd.—Escambia County is incurring considerable expense on account of the arrest, prosecution, and conviction, and imprisonment of persons claimed to be unlawfully riding on the Railroad Trains within this County; The Court of County Commissioners in a lawful manner would like to reduce this expense, and so would like your aid and support in doing so.

“3rd.—Kindly therefore give us answers to these questions herein propounded to you.

"(a)—Has the Court of County Commissioners of Escambia County any jurisdiction or power to prevent expenses on the County arising from the arrest, prosecution, conviction and imprisonment of persons claimed to be unlawfully riding on Railroad Trains in Escambia County?

"(b)—Is it unlawful for the County Sheriff to arrest and jail persons riding on such trains in Escambia County; Is it a violation of the duties of the Sheriff to leave such offenders unmolested, even though requested to be arrested by the Railroad Company?

"(c)—Can you give the Commissioners Court and the Sheriff a letter excusing and relieving the Sheriff and the County Court of Escambia County composed of the Judge, Sheriff and Deputy Solicitor, from arresting, prosecuting, and convicting, such Train Riders; and can you write a letter to that effect to Hon. Thomas A. Peavey, Judge of Probate, and Hon. O. R. Emmons, Sheriff, Brewton, Ala.?

"4th.—On January 8th, 1940, the State Jail Inspector, Miss Stewart, made complaint before the Court about the County Jail and condemned it, and demanded the construction of a new Jail, advising that the Jail was old and small, and out of date, crowded, and that the number of persons imprisoned for riding trains was excessive, and also placed unnecessary costs on the County, etc.;

"5th.—The County is very much interested in the question of said expense, and want to know if they are necessary costs and expenses being placed on the County, by the arrest, conviction and imprisonment of such Train Riders;

"6th.—Accordingly, the Court called the Sheriff, Mr. Emmons before the Court and heard the statements of the Jail Inspector, and also of the Sheriff, in the presence of the Jail Inspector.

"7th.—The Sheriff advised that he had been requested by the L & N Railroad Company to remove and arrest all persons in this County unlawfully riding on the passenger trains; That at the Junction Point, Flomaton, where the Railroads come in from four different directions, and also at other places within the County, such offenders at different times of the year were numerous; that he did not arrest persons riding on the Freight Trains; that he and his deputies do remove and arrest all persons unlawfully riding on passenger trains; that he always removed but did not arrest and place in Jail such persons if they are under sixteen years of age; He contended that he was complying with the law, and not violating any law, or his duty in arresting such persons at the request of the largest taxpayer within the County; the Sheriff also advised that if he received a letter from the Attorney General of Alabama advising him (1) That what he was doing was unlawful; (2) That he was not performing his legal duty; (3) Or if the Attorney General would issue to him a written order to stop arresting all train riders, he would be glad to receive such a letter and would comply with the orders of the Attorney General."

Your questions will not be considered seriatim, since they are all inter-related, and a general discussion of the matter involved will suffice to answer all of them.

Sections 5363 and 5364 of the Code of Alabama, 1923, read, respectively, as follows:

"5363. Unlawful riding on trains.—Any person other than a railway employe in the discharge of his duty, who, without authority of the conductor of the train, or by permission of the engineer, and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride, on the top of any car, coach, engine, or tender, on any railroad in this state, or on the draw-heads between cars, or under cars on truss rods or trucks, or in any freight car, or on a platform of any baggage car, express car, or mail car, on any train in this state, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than ten dollars nor more than one hundred dollars."

"5364. Jurisdiction of offense.—Any person charged with a violation of the preceding section may be tried in any county in which such violation may have occurred or may be discovered."

A violation of the provisions of Section 5363, supra, is a public offense. See Section 3872 of the Code of Alabama, 1923.

Section 10189 of the Code of Alabama, 1923, reads in pertinent part as follows:

"10189. Duties of sheriff.—It is the duty of the sheriff— ***

"(4) It shall be the duty of sheriffs in their respective counties by themselves or deputies to ferret out crime, to apprehend and arrest criminals, and in so far as within their power to secure evidence of crimes in their counties, and to present a report of the evidence so secured to the solicitor or deputy solicitor of the county, or if there is an inferior or special statutory court within the county in which a solicitor prosecutes criminal cases, then to such solicitor."

Article I, Chapter 75, Sections 3261-3288, of the Code of Alabama, 1923, deals with the matters of arrests before indictment, and sets out the powers and authority of the sheriff and his deputies in regard thereto.

It seems very clear from the provisions of our statutory law above cited and quoted that the sheriff is doing nothing more or less than discharging his duty under the law when he arrests and prosecutes persons unlawfully riding on either passenger trains or freight trains in the county of which he is sheriff.

I know of no authority vested in the court of county commissioners in regard to such matters, nor do I know of any authority vested in me, as Attorney General, to order a sheriff of this State not to perform his duties.

While I am not unmindful of the expense to your county which might result from the sheriff discharging his duties in arresting and prosecuting persons unlawfully riding on trains in your county, yet it seems that the remedy for such a situation addresses itself entirely to the Legislature.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 16, 1940.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County,
Florence, Alabama.

Licenses—Interstate commerce—

Non-resident dealers who send their salesmen to Alabama and take orders for tobacco which is delivered within next day or two by their own trucks are not liable for wholesale tobacco license under Schedule 33 of Section 348 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 5, 1940, in which you request my opinion as follows:

"Will you kindly advise me whether M. Cohen & Sons of Pulaski, Tennessee, should be required to pay a wholesale license under Schedule 33 of General Revenue Act of 1935?

"M. Cohen & Sons send their salesmen into Alabama and take orders for tobacco and it is delivered within the next day or two by their own trucks. They do not ship their merchandise by a common carrier. Their deliveries are made similar to local wholesale grocery concerns that are required to pay a license under Schedule 33."

Under the facts stated by you, I am of the opinion that your inquiry should be answered in the negative.

The concern in question, according to the statement of facts, is a foreign concern which sends its salesmen into Alabama and takes orders for tobacco, which are delivered within the next day or two by its own trucks, the deliveries being similar to those made by local wholesale grocery concerns. This concern, in my judgment, is doing solely an "interstate commerce business" and is not subject to wholesale tobacco license under Schedule 33 of Section 348 of the Revenue Act of 1935. This question is analogous to the one presented in the case of *City of Roanoke v. Stewart Supply Co.*, 235 Ala. 23, 176 So. 820. In that case our Supreme Court held that a wholesale grocery corporation located in a foreign state, which solicited orders in this state through salesmen from retailers, and which made regular grocery deliveries by truck, was engaged exclusively in "interstate commerce," and a city ordinance attempting to impose a license or tax on wholesaler for the purpose of raising revenue was a violation of the commerce clause of the Constitution of the United States. In the *City of Roanoke* case, a city ordinance was involved while, in the instant case, a State statute is involved. This difference, in so far as interstate commerce is concerned, is immaterial.

There is nothing presented in the facts to show that the foreign concern was attempting to evade the State license statutes by means of subterfuge so as to bring them within the cases of *Johnson v. State*, 16 Ala. App. 425, 78 So. 419, and *Curry v. Feld*, 190 So. 88.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 17, 1940.

Hon. F. M. Shamblin,
Tax Assessor, Tuscaloosa County,
Tuscaloosa, Alabama.

~~Taxation—Exemption—Boy Scouts—~~

Property owned by Boy Scouts of America and used exclusively for Scout purposes exempt from ad valorem taxation.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of January 5, 1940, in which you request my opinion as follows:

"I will thank you if you will render me an opinion on the following question:

"'Would the property owned by the Tuscaloosa County Boy Scouts of America be exempt from taxation.' This property is used exclusively for their work."

"Section 2. PERSONS AND PROPERTY. The following property and persons shall be exempt from ad valorem taxation and none other: (a) *** all cemeteries; all property, real and personal, used exclusively for religious worship, for schools or **for purposes purely charitable**; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use for business purposes, shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes; *** ." (Italics supplied)

So, if this property is exempt from taxation, it must be on the basis that it is used exclusively for purposes purely charitable. It being stated in your inquiry that the property in question is owned by the Tuscaloosa County Boy

Scouts of America and that it is used exclusively for their work, the question that presents itself to us for decision is whether the Boy Scouts of America is a purely charitable organization.

This is a novel point in Alabama. However, our Supreme Court decided a somewhat analogous situation in the case of *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478, wherein it took judicial knowledge of the fact that the Masonic Lodge is a charitable institution. Furthermore, the Attorney General held in an opinion to Hon. John S. Mooring, Chairman, State Tax Commission, Capitol, on January 9, 1920, Biennial Report of Attorney General, 1918-1920, page 393, that property used exclusively for the purposes of the Masons, Knights of Pythias, and the Y. M. C. A. were exempt from taxation on this ground.

In the recent case of *Tharpe v. Central Council, Boy Scouts of America*, 185 Ga. 810, 196 S. E. 762, it was held that property owned by a regional council of the Boy Scout organization, used for an annual summer camp for boys belonging to the organization (at which the only expense to the boys attending was an amount sufficient to pay for their food), and also open to boys belonging to the organization during the balance of the year (at which time they brought their food with them), was held to be within statutory provisions exempting from taxation "all institutions of purely public charity." In deciding that case, the Supreme Court of Georgia said:

" *** A familiar meaning of the word 'charity' is almsgiving, but as used in the law it may include 'substantially any scheme or effort to better the condition of society or any considerable part thereof.' *Wilson v. Independence First National Bank*, 164 Iowa 402, 412, 141 N. W. 948, 912 Ann. Cas. 1916D, 481. "'Charity," as used in tax exemption statutes, is not restricted to the relief of the sick or indigent, but extends to other forms of philanthropy or public beneficence, such as practical enterprises for the good of humanity, operated at moderate cost to the beneficiaries, or enterprises operated for the general improvement and happiness of mankind.' 61 C. J. 455, Sec. 505. This court has said: 'The property of a Young Men's Christian Association used solely for purposes of public charity, using the term "Charity" in its broad sense, is not taxable, provided its income is not used, nor intended to be used, as dividends or profits.' (Italics ours.) *City of Waycross v. Waycross Savings & Trust Co.*, 146 Ga. 68 (4), 90 S. E. 382. The plaintiff derives no income from the property sought to be taxed, and therefore it is necessary to determine only whether the property is used solely for purposes of public charity, 'using the term "charity" in its broad sense.' It appears that the plaintiff uses the property as a camp or recreation center, open to all of the Boy Scouts in 28 counties in central Georgia. The boys are allowed to use the camp without charge, except that during the annual summer convention they are required to pay for their food. The plaintiff bears all other expenses. During the summer encampment, special courses are provided through instructors furnished by the plaintiff, for the purpose of instilling in the boys the principles of the Scout organization.

"As shown above, the purpose of the organization is the physical, mental, and moral development of boys who have reached a stated age. No one can deny that such an institution is a benefit to society, and that it improves and promotes the happiness of man. In our opinion, the word 'charity,' as used in the statute, and in the provisions of the Con-

stitution authorizing its enactment, Code, Sec. 2-5002, Const. art. 7, Sec. 2, par. 2, is broad enough to include the use which, according to the record, the plaintiff makes of the property here involved. We have been able to find only two cases dealing with the question whether the property used by the Boy Scout organization may be treated as a charitable institution, within the meaning of exempting statutes. In both cases, its charitable nature was recognized. In *Camden County Council, Boy Scouts of America, v. Bucks County*, 13 Pa. Dist. & Co. Rep. 213, it appeared that the use of the property was substantially identical with that shown in the instant case. While the main question for decision was whether the property of the plaintiff, a New Jersey corporation, should be denied exemption as an 'institution of purely public charity' because it was a nonresident corporation, the other question was involved, and in regard to it the court said: 'It is not seriously disputed that the petitioner is an institution of purely public charity, within the meaning of Section 1, article ix, of the constitution of Pennsylvania, and the Act of April 29, 1874, P. L. 73, and the supplements thereto, as interpreted by the Superior Court in *Lancaster County v. Y. W. C. A. of Lancaster*, 92 Pa. Super. 514, and cases cited therein.' In *Charter Oak Council, Inc., Boy Scouts of America v. Town of New Hartford*, 121 Conn. 466, 185 A. 575, 578, the case turned on a different point, but in the course of the opinion the court said: 'The conclusions that the plaintiff corporation is organized exclusively for education and charitable purposes and that the real property in question is used exclusively for carrying out those purposes are amply supported by the finding, which is not susceptible of material correction. They are not invalidated or impaired by any of the facts found concerning the activities and operation of the camp, including the payment, by each Boy Scout attending, of a regular charge toward the expenses, the operation of a camp store, open about twenty minutes a day, the small profits from which go into the camp fund, and the payment, when income permits, of bonuses, in addition to their salaries, to certain officials and employees, for services performed in operating the camp. *Connecticut Junior Republic Association, Inc. v. Litchfield*, 119 Conn. 106, at page 108, 174 A. 304, at page 306, 95 A. L. R. 56, and cases cited; *Tillinghast v. Council at Narragansett Pier*, 47 R. I. 406, 133 A. 662, 46 A. L. R. 823; *Camden County Council, Boy Scouts of America v. Bucks County*, 13 Pa. Dist. & Rep. 213.'"

Also see annotations on this subject in 116 A. L. R. 378.

Therefore, it is my opinion that property owned by the Tuscaloosa County Boy Scouts of America and used exclusively for Scout purposes would be exempt from ad valorem taxation under Section 2 of the 1935 Revenue Act.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 17, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Sheriffs—Costs and fees—

1. Guard allowance provided for by Section 3741 of the Code accrues on trial, in Circuit Court, of appeal from conviction or city ordinance, in case defendant is found guilty on appeal and does not pay the fine and costs accrued in the city court and the costs in the Circuit Court.

2. Guard allowance provided for by Section 3741 of the Code accrues upon conviction for violation of state law of a defendant by a Justice of the Peace or recorder, sitting as ex-officio Justice of the Peace, and, upon defendant being proved insolvent by return of execution "nulla bona", allowance may be payable out of Fine and Forfeiture Fund.

3. Guard allowance provided for by Section 3741 of the Code accrues in cases where defendant is convicted in the Circuit Court and is sentenced to hard labor or to jail, and is payable out of Fine and Forfeiture Fund upon return "nulla bona" of execution issued against defendant.

4. Guard allowance provided by Section 3741 of the Code accrues in cases where defendant is arrested on felony charges and is discharged on preliminary hearing or is bound over to the Grand Jury which fails to indict him therefor.

5. Sheriff's fees in bastardy proceedings before a Justice of the Peace in case where a defendant is discharged are taxable against and payable by the complainant, and cannot be paid from any county fund.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of inquiry, in which you request my opinion as follows:

"Please advise me as follows:

"1. A defendant is convicted for violating a City ordinance and from such conviction appeals to the Circuit Court and is released from the City Jail upon making bond. In the Circuit Court such defendant is convicted and on failing to pay the fine and costs is sentenced to hard labor for the City. Sentence having been passed, the Sheriff of the County takes such convicted person into custody and places him in jail, this being the first and only time such convicted person has been in the County Jail for such offense, to hold until the City authorities call for him to serve his sentence.

"Taking into consideration the facts presented, would the Sheriff be entitled to a Guard Fee for holding such convicted person for delivery to the City authorities after his conviction and sentence?

"2. If your answer is in the affirmative, from what fund of the County would same be payable?

"3. A defendant is tried by a Justice of the Peace or City Recorder for violating a State law, and on conviction and failure to pay fine and costs is sentenced to Jail for a given number of days. After such conviction the Sheriff receives such convicted person and commits him to jail, this being the first and only time such convicted person is committed to the County Jail for such offense to serve his sentence.

"Taking into consideration the facts presented, would the Sheriff be entitled to a Guard Fee for holding such convicted person in the County Jail while he is serving his sentence for failure to pay fine and costs?

"4. If your answer is in the affirmative, from what fund of the County would same be payable?

"5. A defendant is arrested and, before being committed to jail, makes bond and when tried is convicted and sentenced to the penitentiary, to hard labor or to Jail. After conviction the Sheriff commits such convicted person to jail to serve his jail sentence or to hold him for delivery to the proper officials.

"Taking into consideration the facts presented, would the Sheriff be entitled to a Guard Fee for holding such convicted person, under such conditions, in the County Jail?

"6. If your answer is in the affirmative, from what fund of the County would same be payable?

"7. A defendant is arrested for a felony and on **preliminary hearing** is discharged or is bound over to the Grand Jury and the Grand Jury fails to indict.

"Taking into consideration the facts presented, would the Sheriff and Clerk be entitled to any fees for services performed under either condition?

"8. If your answer is in the affirmative, from what fund of the County would same be payable?

"9. A defendant is arrested for a Misdemeanor and, when arraigned before a Justice of the Peace or Inferior Court, demands a Jury Trial. The papers are forwarded to the Grand Jury and the Grand Jury fails to indict.

"Taking into consideration the facts presented, would the Sheriff and Clerk be entitled to any fees for services performed?

"10. If your answer is in the affirmative, from what fund of the County would same be payable?

"11. Can a sheriff collect fees, for services performed in a Bastardy proceeding before a Justice of the Peace or Inferior Court, from any fund of the County when the defendant is discharged?"

In my opinion, your first inquiry must be answered in the affirmative.

Section 3741 of the Code of 1923 provides, in part, as follows:

"Sheriffs are entitled to the following fees and allowances in criminal cases—that is to say: ***

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not.....\$2.00.

"In all arrests under indictment whether convicted or not.....\$2.00.

"In all other cases where convictions follow arrests.....\$2.00."

Section 1937 provides for the appeal from conviction in a municipal court of violation of a municipal ordinance to the Circuit Court or court of like jurisdiction.

Section 1938 provides that if judgment is rendered against a defendant on said appeal, the court shall impose such punishment as seems proper under said ordinance and remand the defendant to the city authorities for execution of the same.

Section 1942 provides:

"After the prisoner has worked out the said fine and costs due the city, or served the sentence of the court, he shall, unless said costs are paid, be delivered to the sheriff of the county to work out the costs incurred in said circuit court or other court, for which sentence shall be passed on him at the time of rendering judgment against him in the same manner and to the same extent as if said costs had been incurred in a case for violation of state law."

Upon the conviction of a defendant in the Circuit Court an appeal from conviction of violation of a municipal ordinance in a municipal court, and the defendant fails to pay fine and costs assessed against him for the use of the municipality, together with the cost of the appeal in the Circuit Court, the judgment imposes two types of punishment upon him. The one punishment is executed by remand to the city authorities for that purpose; and the other punishment is sentence to hard labor for the county for a sufficient number of days to pay the costs on appeal at the rate provided by law.

So that, in taking the defendant into custody and keeping him in jail, the sheriff is executing the process of the state court for the benefit of the state.

In such cases, in my opinion, he is entitled to the guard allowance provided by Section 3741, *supra*; and he may have execution issued against the defendant for the collection of the said guard allowance.

The proper judgment, and the procedure for the execution thereof, in case of appeal from conviction in a municipal court for violation of a municipal ordinance, which appeal results in judgment against the defendant,

which he does not satisfy by the payment of fine and costs, is pointed out in **Dowling v. Troy**, 1 Ala. App. 805. There the defendant was convicted in the city court for violation of a city ordinance and appealed to the Circuit Court. The appeal was determined against him and he failed to pay the fine imposed and the costs taxed for the use of the municipality and failed to pay the costs in the Circuit Court. The judgment of the court, after imposing the punishment for violation of the city ordinance and assessing him with the costs of the city court, remanded him to the city court for the execution of that part of the judgment. It then continued as follows:

"It is further considered and adjudged by the court that after the defendant has served his term of punishment with the city of Troy, he shall be delivered to the sheriff of Pike County to work out the costs incurred in this court, and the said defendant is hereby sentenced to work 66 days at hard labor for Pike County to pay the costs of this court at 40 cents per day sentence begins at the expiration of his term of service to the city of Troy."

If substantially that procedure were followed in judgments rendered by Circuit Courts on appeals from convictions of violations of city ordinances, the matters to which your inquiry is added would be very much simplified.

Answering your second inquiry, it is my opinion that in no event would the guard allowance in such cases be payable from any county fund.

Answering your third inquiry, in my opinion, the guard allowance, which is in reality a "turnkey" allowance, accrues to the sheriff under the facts stated therein. **Section 3741, Code of Alabama, 1923; Stone, Treasurer, v. State ex rel Holcombe**, 197 Ala. 293; **Biennial Report of the Attorney General, 1928-30**, page 194. Cf. **Trapp v. State ex rel Burgin**, 122 Ala. 394.

In a conference had with the writer of the request for opinion, I have ascertained that the question in his mind is, whether or not the guard or "turnkey," allowance can be imposed upon the defendant after conviction, in view of the fact that Section 3740 provides, in part, that:

"All other specified fees for such services as are rendered in the case must be taxed as cost against the defendant, on conviction * * *"

I understand from such conference that the writer of the request for opinion interprets the phrase "on conviction" to mean "up to the moment of conviction"; and that as he interprets the same, any item of cost which has not already accrued at the time of the conviction of the defendant cannot be taxed as cost against him. This interpretation is wholly erroneous. As used in the statute, *supra*, the phrase "on conviction" connotes "in the event of conviction." The fact that the guard or "turnkey" allowance accrues to the sheriff after the defendant has actually been convicted does not prevent the court from taxing the same against the defendant as costs.

And, under the facts in your third inquiry, the sheriff would be entitled to execution against the defendant for the costs, including a guard or "turnkey" allowance.

Answering your fourth inquiry, it is my opinion that the sheriff's "turnkey" allowance, under the circumstances detailed in your third inquiry, may be payable from the fine and forfeiture fund. *Stone, Treasurer v. State ex rel. Holcombe*, 197 Ala., 293—*Cf. Cabler v. Mobile Court*, 230 Ala. 118; *State v. Stone*, 233 Ala. 243; *Trapp v. State ex rel. Burgin*, supra.

Section 1935 of the Code provides in part:

"Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters * * * and shall have the power of an ex-officio justice of the peace except in civil matters."

In my opinion, in cases where the Justice of the Peace or the recorder, acting as an ex-officio Justice of the Peace, has final jurisdiction of an offense against a state law, on conviction of the defendant, the guard allowance of the sheriff is properly allowed as an item of cost.

And, in the event execution against the defendant is returned "nulla bona," the item of cost properly may be paid out of the Fine and Forfeiture Fund, as is provided by Section 4039 of Michie's Code of 1928.

Your fifth inquiry must be answered in the affirmative upon the same reasoning and authority pointed out herein in answer to your third inquiry. The fact that the defendant is not committed to jail until after his conviction is not pertinent.

Answering your sixth inquiry, the guard allowance in such cases may be paid from the County Fine and Forfeiture Fund as is provided by Section 4039 of the Code, supra, in the event the defendant is proved insolvent by return of execution "nulla bona."

The first subsection of the except from Section 3741 of the Code, supra specifically answers in the affirmative your seventh inquiry, if he is committed to jail, in so far as guard allowance is concerned. Your inquiry is too general to admit of accurate answer as the "any fee." If you have a specific case in mind, I shall be pleased to advise you further upon your request therefor.

Answering your eighth inquiry, in so far as the same applies to sheriff's guard allowance, in my opinion, it cannot be paid from the Fine and Forfeiture Fund in any event. *Kilgore v. Swindle*, 219 Ala. 378, 122 So. 333.

Your ninth inquiry is laid in too general terms to admit of accurate answer. If you have any specific case, I shall be pleased to advise you further. This obviates the necessity of an answer to your tenth inquiry. However, no guard allowance can be paid from the Fine and Forfeiture Fund. *Kilgore v. Swindle*, supra.

Answering your eleventh inquiry, it is my opinion that under the facts submitted, the sheriff's costs in bastardy cases cannot be collected from any county fund. This situation is specifically provided for by Section 3438 of the Code:

"In case the issue provided for by Section 3425 is found against the complaint, judgment for costs must be rendered against her."

Cf. Biennial Report of the Attorney General, 1930-32, page 665 and cases there cited.

This opinion is a re-write of the opinion which appears in Quarterly Report of the Attorney General, Vol. XIV, page 240, which through error, was prematurely published.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 17, 1940.

Hon. R. E. Woodruff,
Judge of Probate,
Lowndes County,
Haynesville, Ala.

Taxation—Deed Record Tax—Life Estate Undivided interest—

Deed tax upon record of deed conveying land, subject to life estate, is based upon fair market value of the land less the value of the life estate, to be ascertained from life expectancy of tenant for life as shown by mortality tables and life tenant's general physical condition, appearance and state of health.

If undivided interest is conveyed, tax will be based upon the value of the interest so ascertained. Revenue Act 1935, p. 456, Schedule 46.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of December 30, 1939, in which you request my opinion as follows:

"There has been filed for record in this office a deed which conveys a remaining undivided five sevenths interest in certain property in Lowndes County, valued at \$15,946.00.

"The life tenant is an elderly lady probably sixty five years of age, but to all appearances, and the natural course of events could easily live another ten years. Naturally the property being conveyed does not have the same value of grantee as if it were an outright conveyance.

"This is a new proposition to this office, and I would appreciate your advice as to how this deed should be taxed."

The copy of the deed submitted for examination, as I construe it, purports to convey an undivided 5/7 interest in three separate tracts of land, together known as the Edmond Hill Place, subject to a life estate in a tenant for life aged 65, together with a fee simple title in other land, in consideration of love and affection. It become necessary to ascertain the value of the interest conveyed.

Act No. 194, H. 324, approved July 10, 1935, Section 348, Schedule 46 (General Acts 1935, 256 at page 456).

The statement, as I construe it, shows the value of the fee simple title in the entire tract to be \$15,946. You should, therefore, ascertain: (a) the value of the land (Edmond Hill Place) which is subject to the life estate; the value of the land (Edmond Hill Place) which is subject to the life estate; and (b) the present value of the life estate, based upon the mortality tables showing the life expectancy of a person aged 65, and other factors material to the question.

After deducting item (b) from item (a) take two-sevenths thereof, being that part of the estate in remainder which is not conveyed, which I will designate as item (c) for convenient reference.

Now assuming \$15,946 to be the value of the fee simple title in and to the entire tract, if item (c) is deducted, the remainder will represent the value of the interest conveyed, to be taken as the basis for computation of the tax on the record of the deed submitted for examination.

It will be for you to determine the value of the interest in question. That is a question of fact as to which I am unable to aid you.

Long v. Jasper Land Co., 217 Ala. 593, 117 So. 210. **Quarterly Report, Attorney General** Vol. XIV, page 55, being opinion rendered January 27, 1939 to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, that grantee is entitled to deduct value of the life estate retained by grantor, for purposes of the deed tax. This opinion will also indicate the method for determining the value of the life estate.

Steiner Bros.. v. Berney, 130 Ala. 289.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 18, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

1. Counties not authorized to purchase license tag for chief deputy sheriff's car.

2. Chief deputy sheriff not entitled to free tag for his car, although it is used exclusively for county business.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of December 23, 1939, in which you request my opinion as follows:

"Please advise us whether or not Elmore County can legally purchase License Tag for Chief Deputy Sheriff where car is used exclusively for county service by Chief Deputy Sheriff. Also advise whether or not we can purchase \$1.00 tag for this car where used only for county business by the Chief Deputy Sheriff."

I know of no authority for the county, in the absence of a special or local act, to purchase a license tag for the chief deputy sheriff's car.

As to whether or not the chief deputy sheriff is entitled to a \$1.00 license tag where he uses his car exclusively for county purposes, I call your attention to Schedule 158.9, Section 348 of the 1935 Revenue Code, as amended by Act No. 217, H. No. 177, approved March 2, 1937, Acts of 1936-37, page 258, which is as follows:

"An Act to amend Schedule 158.9 of Section 348, Chapter 6, of Article XIII, of Act entitled, 'An Act to provide for the general revenue of the State of Alabama,' approved July 10, 1935.

"Be it enacted by the Legislature of Alabama:

"That Schedule 158.9 of Section 348 Chapter 6 of Article XIII, of an Act entitled, 'an Act to provide for the general revenue of the State of Alabama' be amended to read as follows: Schedule 148.9. Motor Trucks, Semi-Trailer trucks or motor vehicles **owned and used** by the State, counties or any municipalities of this State shall not be liable for the payment of license tax levied by this Act, but shall carry tags. The purchasing agent or other officer of the State, county or municipality shall apply to the State Tax Commission giving the make, type, model, motor number, and serial number of the vehicle or vehicles owned and used by the State, county or municipality, together with such other information as the State Tax Commission shall require, which information shall be furnished under oath by such officer. If upon examination, the same appears regular to the State Tax Commission, it shall issue to such purchasing officer or other official, to be placed on such motor vehicle the necessary number of tags and such tags shall be used on no other vehicle than that for which issued. State tags shall have the letter (S) stamped thereon and county tags shall have the name of the county and the proper numbers and the municipal tags shall have the word 'municipal' and proper number stamped thereon. For issuance of such tags and to cover the expense of preparing same, there shall be paid the sum of One Dollar. Such motor vehicle shall be used exclusively in the governmental or corporate functions of the State, county or municipality to which issued.

"Approved March 2, 1937."

(Emphasis supplied)

I also call your attention to an opinion of this office, directed to Hon. W. H. Holcombe, Sheriff, Mobile County, Mobile, Alabama, under date of May 17, 1933, Biennial Report of Attorney General, 1932-34 page 235, which held that there is no authority for the issuance of free tags to sheriffs for their individually owned cars.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 18, 1940.

Hon. Sim L. Howell, Chairman,
Morgan County Board of Revenue and Control,
Decatur, Alabama.

1. The local act approved September 6, 1935, fixing the salary of the chief deputy sheriff of Morgan County is unconstitutional under Section 105 of the Constitution, and is void and of no effect.

2. The local act for Morgan County approved September 6, 1935, creating a deputy sheriff for said county and fixing his salary appears to be without constitutional objection and, therefore, valid.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of January 9, 1940, in which you request my opinion as follows:

"The Board of Revenue and Control has directed me to request your opinion as to its authority in the matter of compensation for the Chief Deputy and an additional Deputy Sheriff for Morgan County.

"The Sheriff has requested the payment of \$150. monthly to each of these officers, and the Board is anxious to know if compliance with his request would be lawful.

"In 1935 the Legislature passed two Acts providing for the payment of compensation to each of these officers, and these Acts should be taken into consideration by you in determining the legality of the payment about which you are herein questioned."

In reply to your inquiry, attention is first called to Act No. 340, H. 764, approved September 6, 1935 (Local Acts, 1935, page 206) and Act No. 341, H. 765, approved September 6, 1935 (Local Acts, 1935, page 207). These acts are as follows:

"No. 340.

"An Act to prescribe the salary and the manner of payment of the same of the chief deputy sheriff for Morgan County, Alabama.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. The salary of the chief deputy sheriff for Morgan County, Alabama, shall be in the sum of one thousand and fifty dollars per annum, the same to be paid in equal monthly installments out of the treasury of said county, upon the warrant of the Board of Revenue or other governing board of said county.

"Section 2. That all laws and parts of laws in conflict herewith are hereby expressly repealed, and this act shall be of force and effect from and after its approval by the Governor.

"Approved September 6, 1935."

"No. 341.

"An Act to allow the Sheriff of Morgan County, Alabama, a deputy sheriff in addition to the chief deputy sheriff, and fix his salary, and make it payable out of the general funds of the county in equal monthly installments, said deputy to be located in Decatur, Alabama.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"1. That the Sheriff of Morgan County, Alabama, is hereby allowed a deputy sheriff in addition to the chief deputy sheriff, which said deputy sheriff shall be located at Decatur, Alabama, and shall receive a salary of one thousand and fifty dollars per annum, to be paid in equal monthly installments out of the general fund of said Morgan County, and shall be eligible to perform duties anywhere in said county.

"2. On the first day of each month, a statement of the name and amount due said deputy sheriff shall be furnished the Board of Revenue of said county by the sheriff of said county, and it shall be the duty of said Board of Revenue to order a warrant drawn upon the general funds of said county in favor of said deputy sheriff for the amount of the month's salary.

"3. Be it further enacted that all laws and parts of laws in conflict herewith are hereby expressly repealed and this act shall be of force and effect from and after its approval by the Governor.

"Approved September 6, 1935."

It will be noted that Act No. 340, *supra*, fixes the salary of the Chief Deputy Sheriff of Morgan County, Alabama at One Thousand and Fifty Dollars (\$1050.) per annum and Act No. 341, *supra*, provides for a deputy sheriff to be located in Decatur, Alabama, in addition to the Chief Deputy Sheriff, and fixes the salary to be paid said additional deputy at One Thousand and Fifty Dollars (\$1050) per annum.

Therefore, it follows that in order to answer your inquiry it will be necessary to pass on the constitutionality of the local acts, *supra*, because unless the said acts are unconstitutional, the Board of Revenue and County of Morgan County, Alabama, is bound by the provisions of the same.

I will consider first Act No. 340, *supra*, which seeks to regulate the salary of the Chief Deputy Sheriff of Morgan County, Alabama. This act in my opinion is unconstitutional as it violates Section 105 of the Alabama Constitution of 1901. My opinion in this connection is based upon the case of *Evans v. Long*, 227 Ala. 335, 149 So. 837, wherein a proposition on all fours with the one here presented was considered by our Supreme Court.

Based on the decision in the case of *Evans v. Long*, *supra*, it necessarily follows that the salary to be paid the Chief Deputy of Morgan County, Alabama, must be controlled by the provisions of Section 10188 of Michie's Code of Alabama, 1928, which is as follows:

"Section 10188. Deputies.—In all counties of the State of Alabama which now have not more than two hundred thousand inhabitants, according to the last federal census or which may hereafter have such population according to any federal census hereafter taken, in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board or revenue or other governing body of the county in which each chief deputy is appointed not less than nine hundred and not more than fifteen hundred dollars, payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county."

At this point I call attention to the fact that this office in an opinion to Hon. J. S. Sandlin, Sheriff, Morgan County, Decatur, Alabama, dated December 3, 1935. (Quarterly Report, Attorney General, Vol. I, page 28), held Act No. 340, *supra*, to be constitutional. This opinion, however, considered the constitutionality of said act only as to subdivision 24 of Section 104 of the Constitution of Alabama, 1901.

It is my opinion that Act. No. 341, *supra*, is constitutional, provided the requirements of Section 106 of the Constitution have been complied with in the enactment of said act, and the Board of Revenue and Control of Morgan County, Alabama, is bound by the provisions of the same.

Our Supreme Court in the case of *Court of County Commissioners v. Lightner*, 225 Ala. 22, 141 So. 908, passed upon an act similar to the one

here being considered and held that it was not violative of Section 96, 281, 68, 105 and subdivision 24 of Section 104 of the Constitution of Alabama, 1901.

The conclusion here reached as to the constitutionality of Act No. 341, supra reaffirms the opinion of this office to Hon. J. S. Sandlin, Sheriff, Morgan County, Decatur, Alabama, supra, on this question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 18, 1940.

Hon. Travis H. Johnson,
Treasurer, Walker County,
Jasper, Alabama.

Counties—Road and Bridge Fund—

1. County may transfer funds from the general fund of the county to the road and bridge fund, or a portion of the same, provided there be a surplus in the general fund.
2. Clerk's salary may be paid from road and bridge fund under certain conditions.
3. Ferryman's salary may be paid from road and bridge fund.

Opinion by Assistant Attorney General.

Dear Sir:

I have your letter of November 14, 1939, in which you request my opinion as follows:

"In a regular meeting of our County Board of Revenue last Friday Nov. 10, 1939, a motion or resolution was adopted substantially as follows:

"To provide that the salary of the Assistant Clerk for the Walker County Board of Revenue shall be \$80.00 per month, same to be paid from the Road and Bridge fund—The total salaries for the several ferrymen of this county shall be \$215.00 per month, same to be paid out of the Road and Bridge Fund.

"The Road and Bridge fund as referred to above is a 2½ mill Ad Valorem tax levy as provided for (Section 215 of the 1901 Constitution).

"Question: Do claims, such as is mentioned above, constitute legal

claims against the Road and Bridge fund? Can those salaries be paid from that fund, even if there was a surplus in the Road and Bridge fund? At present it is necessary to supplement the Road and Bridge fund with an appropriation from the General Fund of about \$3,000.00 annually to meet the bonded obligations and interest maturing annually and to be paid out of the R & B fund."

In answering your inquiry, let us look first at the question of transferring funds from the general fund to the road and bridge fund. This office has heretofore held that such a transfer is allowable provided there is a surplus in the general fund. I quote from a recent opinion of the Attorney General rendered to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, under date of September 21, 1939, reported in Quarterly Reports of Attorney General, Vol. XVI, page 262:

"It is my opinion that Section 1397 (115) of Michie's Code of 1923 answers your request. This section is as follows:

" '1397 (115). Surplus from general fund of county transferred to road fund.—The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the county in the county treasury, or any part of such surplus whenever in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties.'

"Of course, there are certain restrictions thrown around such a transfer. In the case of **Rhodes v. Marengo County Bank**, 205 Ala. 667, 88 So. 850, our Supreme Court lays down the following rule:

" 'While Act Sept. 22, 1915 (Laws 1915, p. 573), authorizes the transfer of any surplus of the general fund to road fund, a transfer of a portion of the general fund to the road fund cannot be justified under that act, where the county was much indebted, and there were warrants having priority unpaid.'

"The above simply means that you cannot make such a transfer from the general fund to the road and bridge fund of your county where by so doing you are likely to impair the general fund to such an extent that warrants having priority could not be paid. In other words there cannot be said to be a surplus in the general fund until all preferred claims against the county, and all appropriations which the law makes mandatory **have been paid**, or adequate funds are on hand sufficient to meet all preferred claims. After this has been done, if a surplus remains, the court of county commissioners may lawfully transfer any such surplus to the road fund to be used as provided by law. See Biennial Report of Attorney General, 1930-32, p. 446; **Ramage Park & Co., v. Folmar**, 214 Ala. 661, 108 So. 580.

"There must be strict compliance with the fore-going or else no such transfer is lawful. **Rhodes v. Marengo County Bank**, supra; **Mims, Treasurer v. Stallworth**, 180 Ala. 511, 61 So. 811."

Now the question presents itself as to whether or not the claims mentioned in your inquiry are legal claims against the road and bridge fund. It is my opinion that under the resolution as set out in your inquiry the clerk's salary would not be a legal claim against the road and bridge fund, because the clerk's duties are not limited to matters concerning the construction, maintenance and improvement of public roads of the county. However, this office has heretofore held in an opinion to Mrs. Gertrude P. Calloway, County Treasurer, Chilton County, Clanton, Alabama, under date of January 15, 1932, Biennial Report of Attorney General, 1930-32, page 667, that county boards of revenue have authority under Section 157 of Act No. 347, H. 391, approved August 23, 1927, General Acts 1927, page 391, (Section 1397 (110) of Michie's 1928 Alabama Code), **to employ a clerk and provide a salary for same from the road and bridge fund, whose duties should be limited to matters concerning the construction, maintenance and improvement of public roads of the county.** Section 1397 (110), Michie's 1928 Code of Alabama, supra, is as follows:

"Section 1397 (110). Powers of courts of county commissioners with regards to roads, bridges and ferries. The courts of county commissioners, boards of revenues, or other like governing bodies of the several counties of this State have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this article, courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

See also Biennial Report of Attorney General, 1936-38, page 707.

It is also my opinion that under the authority of the above quoted section, the salary of the several ferrymen of the county are payable from the road and bridge fund. Cf. opinion of the Attorney General to Chairman of County Commission of Walker County, under date of February 12, 1935.

Your attention is directed to the fact that the right to pay the salary of said clerk and ferrymen out of the road and bridge fund where said fund is insufficient to meet the annually maturing bonded obligations and interest payable therefrom, whether said fund is supplemented by funds from the general fund of the county or not, is not herein considered.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 20, 1940.

Hon. T. R. Snead,
Judge of Probate,
Cherokee County,
Centre, Alabama.

Cherokee County—Constitutional Law—

Act No. 249, H. 294, approved August 24, 1939, not violative of Section 105 of the Constitution.

Act No. 251, H. 296, approved August 24, 1939, not violative of Section 105 of the Constitution; nor invalid by reason of the fact that it withdraws authority, functions, and duties from the governing body of the county and imposes them upon an agency thereby created.

Act No. 250, H. 295, became a law under Section 125 of the Constitution, without the Governor's approval, notwithstanding a provision therein that it should take effect upon its approval by the governor.

Act No. 250, H. 295, approved August 24, 1939, and Act No. 251, H. 296, approved August 24, 1939, are not in irreconcilable conflict.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for official opinion dated November 4, 1939, which follows:

"1. Act No. 249 (H. 294-Cobb) was approved August 24, 1939, and this said act by its terms purports to abolish the Court of County Commissioners of Cherokee County, Alabama, and the office of the County Commissioner therein. This said act is a local act of the Legislature, and was passed as such. It is my information that the Court of County Commissioners and the office of County Commissioner was established by General Laws of Alabama. I shall therefore appreciate your advising me at once.

"Whether this act is in conflict with Section 105, Article IV, of the Constitution of Alabama?

"2. Act No. 251, (H. 296-Cobb) was approved August 24, 1939, and this said Act by Section 7 provided that the entire authority of the Court of County Commissioners or the Board of Revenue be invested in a Road Supervisor, and to like effect is Section 10 thereof, this said Section 10 invests the said Road Supervisor with all of the duties, powers and authorities that was theretofore vested in the Court of County Commissioners or Board of Revenue. Under this said section, the authority and responsibility of everything pertaining to the Public Roads and bridges, as well as all purchases of materials and the dis-

bursement of all funds to be expended in connection with public roads and bridges of said County appears to be vested in said Road Supervisor I shall therefore appreciate your opinion on the following:

“(a) Whether this said Act is in conflict with Section 105 of the Constitution of Alabama.

“(b) Whether this section is in conflict with the constitutional inhibitions upon the delegation of authority of the Commissioner's Court to an individual.

“(c) Whether this Act in its entirety does or does not conflict with the limitations upon the Legislature to delegate the authority of courts of county commissioners to such a Road Supervisor.

3. Act No. 250, (H. 295-Cobb) was not, I am informed, signed by the Governor of Alabama, and I am advised that the said Act became a law under Section 125 of the Constitution. I wish to direct your attention to Section 15 of this act which reads:

“Section 15. That this Act shall take effect and be in force upon its approval by the Governor.”

“I shall appreciate your opinion upon the following question, viz:

“(d) Whether or not, where a local Act is passed in compliance with Section 106 of the Constitution, and there is contained therein a provision as to future requirements, i. e. **‘the approval of the Governor’** this requirement must be fully met prior to the enforcement of such an act as a law.

“(e) Can this act, with the provision contained in Section 15, ever be deemed to have been effective, since the Governor failed to approve the same within the time prescribed by Section 125 of the Constitution, and in the manner as therein provided?

“(f) Where the legislative intention is expressed as to the Act's effective time, i. e. **‘This Act shall take effect and be in force upon its approval by the Governor,’** will it not be necessary to have such approval prior to such Act being in effect, under section 125 of the Constitution?

“4. I also desire to call your attention to Section 7 and 9 of this said Act (Act 250) (H. 295-Cobb), which creates a Board of Revenue in lieu of the Court of County Commissioners, and which bestowes upon such Board all of the duties to do and perform all of the acts, and to exercise all powers and functions possessed by the Court of County Commissioners. I shall appreciate your opinion upon the following questions:

“(g) Is there not an irreconcilable conflict in the provisions of Sections 7 and 9 of Act No. 250 (H. 295-Cobb) with Section 7 et seq. of Act No. 251 (H. 296-Cobb) that would make the provisions of said two acts impossible to administer?

"(h) In such a case is not one or both of such acts unconstitutional?

"(i) Whether or not this Act No. 250 is in conflict with the Constitution of Alabama.

"(j) Does not this Act conflict with Section 195 of the Constitution?

"I shall greatly appreciate your immediate reply to the above questions, since we are being called on to comply with these three acts."

In answer to your first inquiry, I have to advise that, in my opinion. Act No. 249, H. 294, approved August 24, 1939, is not violative of Section 105 of the Constitution.

The Supreme Court recently reviewed a local act relating to Morgan County, in a case styled **Morgan County et al v. Newt Edmundson**, 8 Div. 8 (now in MS), in which the specific question is answered. Mr. Justice Gardner speaking for the court said, as to this particular phase:

"First, it is insisted that it is violative of Section 105 of our constitution, in that the provisions of the law are such as are provided for by the general laws of the state relating to commissioners' courts for the several counties. Sections 6748 et seq., Code of 1928. * * *

"Numerous authorities are cited, among them **Dunn v. Dean**, 196 Ala. 486, perhaps here more nearly in point, and which fully sustain the view that the act in question does not offend Section 105 of the Constitution."

Answering your second inquiry, I have to advise that, in my opinion, Act No. 251, H. 296, approved August 24, 1939, is not violative of Section 105 of the Constitution. I have further to advise you that there is no constitutional inhibition against the Legislature withdrawing any part of the authority, duties, functions and powers of courts of county commissioners or like governing bodies and imposing such authority, duties, functions and powers upon other agencies provided for by law.

The Supreme Court recently decided that question in a case styled **Frank M. Johnson et al. v. Joe Robinson et al.**, 6 Div. 609 (now in MS) in considering a local act of Winston County which withdrew from the existing governing body thereof all authority, functions, jurisdiction and powers of such governing body relative to the public roads and bridges of said county.

Mr. Justice Brown speaking for the court said:

"The act, in short, takes away from the court of county commissioners of Winston County jurisdiction over public roads and bridges and the funds provided by law for the construction and maintenance of such roads and bridges, and creates a 'Highway Board of Winston County,' * * * and confers on said Highway Board all the jurisdiction theretofore exercised by the court of county commissioners of public roads and bridges and the funds provided by law for the construction, maintenance and supervision of said roads and bridges. * * *

"The * * * contention of appellants is that the act is violat^e of Article 4, Section 105 of the Constitution. This contention is without merit, and appellants' argument in support thereof is fully answered by the opinion of the court in *Morgan County et al v. Newt Edmundson*, 8 Div. 8, MS, and the authorities therein cited."

It might be well to call to your attention the fact that Act. No. 251, *supra* is taken almost verbatim from a local act of Chilton County providing for a road supervisor for that county, (Act No. 3, approved March 10, 1936, General and Local Acts, Extra Session, 1936, p. 4). The Supreme Court has construed this local act of Chilton County in *Thompson v. Chilton County*, 236 Ala. 142, 181 So. 701, and in *Arledge v. Chilton County*, 237 Ala. 96, 185, So. 419.

Answering your third inquiry, it is my opinion that Act No. 250, H. 295, which became a law without the approval of the Governor under Section 125 of the Constitution, is a valid enactment, notwithstanding the provision in Section 15 thereof "that this act shall take effect and be in force upon its approval by the Governor." The appellate courts have decided this specific question in *Jemison v. Town of Ft. Deposit*, 21 Ala. App. 331, 108 So. 396, certiorari denied 214 Ala. 471, 108 So. 397, and in *Ex Parte Bowdoin*, 25 Ala. App. 66, 141 So. 911, certiorari denied in *Ex Parte Parks, Judge*, 225 Ala. 8, 141 S. 914.

Answering your fourth inquiry, I am of the opinion that there is no irreconcilable conflict between the provisions of Sections 7 and 9 of Act No. 250, H. 295, *supra*, and any of the provisions of Act No. 251, H. 296. *Thompson v. Chilton County*, *supra*; *Arledge v. Chilton County*, *supra*.

Both acts were passed on the same day and both relate to the same general subject, viz: The establishing of a new system for the operation of the affairs of Cherokee County. In such a situation, the rule is that both acts must be considered to arrive at the legislative intention. Ala. Digest. "Statutes," Key 225, 225½.

In your question numbered 4(i) you ask whether or not Act No. 250, H. 295, is in conflict with the Constitution of Alabama.

Taking a cue from the courts, this office does not undertake to pass upon questions as to the constitutional validity of acts, posed generally. We are required to assume that an act is constitutional until its validity is questioned upon some specific ground. If there's any question in your mind of the validity of any of these acts under any specific section or provision of the Constitution, we shall be pleased to advise you upon being apprised of the specific provision which you have in mind as being applicable.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 22, 1940.

Hon. William J. Kern, Clerk,
Inferior Criminal Court, Mobile County,
Mobile, Alabama.

Industrial Relations Department—Unemployment Compensation
Commission—

Fines for violation of Unemployment Compensation Laws held
payable to fine and forfeiture fund of the county in which the
prosecution originated.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of October 9, 1930, requesting my opinion as follows:

"Please let me know at your earliest convenience to whom should
be paid fines collected by this Court for the violation of Alabama Com-
pensation Act (as amended) on and after September 30th, 1939."

In reply, I wish to refer you to Section 15 of Act No. 447, S. 395, ap-
proved September 14, 1933 (General Acts, 1935, p. 950) which provides:

"Section 15. PENALTIES (a) Whoever wilfully makes a false state-
ment or representation to obtain or increase any benefit or other pay-
ment under this Act, either for himself or for any other person, shall
upon conviction be punished by a fine of not less than twenty nor more
than fifty dollars, or by imprisonment in the county jail not longer than
thirty days, or by both such fine and imprisonment; and each such false
statement or representation shall constitute a separate and distinct of-
fense. (b) Any employer (of any person in this state) and any officer
or agent of an employer, who wilfully makes a false statement or repre-
sentation to avoid becoming or remaining subject hereto or to avoid or
reduce any contribution or other payment required of such employer
under this act, or who wilfully fails or refuses to make any such con-
tribution or other payment or to furnish any reports duly required here-
under or to appear or testify or produce records as lawfully required
hereunder, or who makes or requires any deduction from wages to pay
all or any portion of the contributions required from employers, or who
tries to induce any employee to waive any right under this act, shall
upon conviction be punished by a fine of not less than twenty nor more
than two hundred dollars, or by imprisonment in the county jail not
longer than sixty days, or by both such fine and imprisonment; and each
such false statement or representation, and each day of such failure
or refusal, and each such deduction from wages, and each such attempt
to induce shall constitute a separate and distinct offense. (c) Any
violation, of any provision of this Act, for which a penalty is neither
prescribed above nor provided by any other applicable statute, shall
be punished by a fine of not less than twenty nor more than fifty
dollars, or by imprisonment in the county jail not longer than thirty
days, or by both such fine and imprisonment. (d) On complaint of

the commission the fines specified or provided in this section may be collected by the state in an action for debt. All fines thus collected shall be paid to the unemployment administration fund."

I wish to further refer you to Section 13 of Act No. 497, S. 440, approved September 21, 1939, which amends Section 15 of the 1935 Act, supra. It provides as follows:

"Section 13. That Section 15 of the Act, the title of which appears in the caption hereof, be amended to read as follows: Section 15. PENALTIES. (a) Whoever wilfully makes a false statement or representation to obtain or increase any benefit or other payment under this Act, either for himself, or for any other person, shall upon conviction be punished by fine of not less than twenty nor more than fifty dollars, or by imprisonment for not longer than thirty days, or both such fine and imprisonment; and each such false statement or representation shall constitute a separate and distinct offense. (b) Any officer or agent of an employer, or any employer who is an individual, who wilfully makes a false statement or representation to avoid his employer or himself becoming or remaining subject to this Act for contributions, or to reduce any contribution or other payment required of such employer or him under this Act, or who willfully fails or refuses to make any such contributions or other payments as lawfully required hereunder, or who induces any employee to waive any rights under this Act; or, any officer or agent of an employing unit, or any employing unit who is an individual, who refuses to furnish reports duly required hereunder or to appear or testify or produce records as lawfully required hereunder, shall upon conviction be punished by a fine of not less than twenty nor more than two hundred dollars or by imprisonment for not longer than sixty days, or by both such fine and imprisonment; and each such false statement or representation and each day of such failure or refusal, and each such inducement shall constitute a separate and distinct offense. (c) Any claimant convicted by a court of competent jurisdiction of making false or fraudulent representations with the object of obtaining benefits to which he was not entitled shall be declared ineligible to receive benefits for such number of weeks not less than eight weeks from the day of said conviction or from the date said conviction is finally sustained, as may be determined by the Director, if an appeal is taken from said conviction, not extending beyond the then present benefit year of such claimant. (d) Any person who, by reason of the non-disclosure or misrepresentation by him or by another of a material fact (irrespective of whether such non-disclosure was known or fraudulent), has received any sum as benefits under this Act while any conditions for the receipt of benefits imposed by this Act were not fulfilled in his case, or while he was disqualified from receiving benefits, shall be liable to have such sum deducted from any future benefits payable to him under this Act. (e) Any violation of any provision of this Act, for which a penalty is neither prescribed above nor provided by any other applicable statute, shall be punished by a fine of not less than twenty nor more than fifty dollars, or by imprisonment for not longer than thirty days, or by both such fine and imprisonment."

You will note that the provisions of Section 15 of the above quoted act of 1935 are amended by the provisions of the above quoted act of 1939.

You will note that Subsection (e) of the last above quoted act of 1939 changes the provisions of the 1935 act, quoted supra, in so far as the

amounts and nature of the penalties are concerned. No provision for the disbursement of the fines appears. In my judgement, this circumstance compels a consideration of the general law for a provision controlling the disposition of fines and forfeitures in cases where no specific provision appears.

I wish to refer you to Section 4038 of the Code of Alabama, 1923, which provides as follows:

"Section 4038. Fines to go to county, and judgment accordingly.— All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

The provisions of this section are mandatory. See **Ryan v. Collins**, 196 Ala. 478, 71 So. 690.

You ask to whom the "fines for violation of the Alabama Unemployment Compensation Act (as amended) shall be paid on and after September 30, 1939?"

I wish to refer you to Section 18 of the above quoted act of 1939, which provides as follows:

"Section 18. That Section 20 of the Act, the title of which appears in the caption hereof, be amended to read as follows: Section 20. **EFFECTIVE DATE.** Section 12 of this Act shall become effective upon approval of this Act by the Governor. All other sections shall become effective on the day preceding the first day of the first calendar quarter immediately following the approval of this Act by the Governor."

You will observe that the provisions of the named act of 1939, with which we are here concerned, became effective on and after the first day of October following the date of approval of the act, viz, September 21, 1939, October first being the first day of the first calendar quarter following the date of approval of the above quoted act of 1939.

The premises considered, it is my opinion that the fines and forfeitures collected under the provisions of the above quoted 1939 act should be paid into the fine and forfeiture fund or such fund which might have supplanted the fine and forfeiture fund under the terms of a special or local law, of the county in which the prosecution originated.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 23, 1940.

Hon. R. C. Derby,
Tax Assessor, Sumter County,
Livingston, Alabama.

Counties—Authority to reimburse officer for expenses paid by officer for which no claim was filed within time provided by law—

County governing body is not bound to allow a claim for reimbursement for post office box rent paid by county tax assessor in case where the post office box was rented by said officer without the approval of such governing body.

County governing body may, in its discretion, reimburse county tax assessor for such expenditures under Section 186 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"I have yours of recent date enclosing opinion to the State Comptroller with reference to Post Office box rent for County officials.

"I desire your opinion as to how far back this claim should be paid by the Board of Revenue. In view of the opinion of May 6, 1930, Report of Attorney General, 1928-30, Page 826, no claim has been filed by the Tax Assessor for this small bill. Sec. 186 of the Code of 1923 would seem to modify the one year statute of limitations. Please advise me for just how many years the Board of Revenue should pay this small expense."

It is my opinion that the county governing body is not bound to allow a claim for reimbursement for post office box rent paid by the county tax assessor in case the post office box was rented without the approval of such governing body. However, the governing body **may reimburse** such officer for such expenditures under Section 186, Code of Alabama, 1923.

The opinion of this office to Hon. B. P. Singleton, State Comptroller, under date of May 15, 1939, Quarterly Report of Attorney General, Vol. XV, page 133, which holds that the county governing body should allow reasonable expenses for post office box rent for tax assessor, tax collector, register of circuit court in equity, circuit clerk, sheriff, judge of probate, county treasurer, and, in its discretion, may pay similar expenses for county health officer, is based on a construction of Section 9604, Michie's Code of Alabama, 1928, and subsection 12 of Section 1058, Code of Alabama, 1923 as amended by Act No. 443, So 247, approved September 13, 1935. (General Acts of Alabama 1935, page 918). Said Section 9604, *supra*, is as follows:

"9604. Stationery of officers paid for by county.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity,

clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephone to be paid for by the county, **on the approval of the court of county commissioners, board of revenue or other like governing body**, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county." (Emphasis supplied)

As you will note, said Section 9604 provides that the tax assessor should be allowed reasonable expenses for certain items, upon the approval thereof by the county governing body. Since the post office boxes have been rented by the officer without the approval of the county governing body, it is my opinion that the county is not absolutely liable to reimburse him. I refer you to an opinion of this office addressed to Hon. Roy Johnson, Tax Assessor of Jefferson County, under date of June 6, 1939, Quarterly Report of the Attorney General, Vol. page 263, upon which the conclusion of this opinion is based. I refer you also to the case of **Escambia County v. Dixie Chemical Products Co.**, 229 Ala. 287, 156 So. 631.

As indicated above, it is my opinion that, although the claims in question are not legal charges against the county which it is absolutely required to pay, inasmuch as personal funds were expended by said officers in good faith, of which the county has had the benefit, the county governing body **may** reimburse the officer for such sums as he may have paid therefor under Section 186, Code of Alabama, 1923. Said Section 186 is as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purpose: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, to refund to any person, firm or corporation, money or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvements, tick eradication or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

See Quarterly Report of the Attorney General, Vol. XV, page 203 and Quarterly Report of the Attorney General, Vol. XIV, pages 142, 144.

The question then arises of how many years back such claims may be paid.

It is my opinion that the claim of the tax assessor may be paid since September 6, 1927, upon which date said Section 9604 was amended to include the tax assessor.

I emphasize the point, however, that the allowance of equitable demands against the county, which have been barred by failure of the claimants to file claims therefor within the time required by law, is a matter which rests in the sound discretion and judgment of the county governing body. There is **no requirement** that all or any part of such claims **must** be allowed. It may suggest itself to the county governing body that reimbursement to the officer for post office box rent paid by him for one, two, three or any other number of years back would be equitable. Once the governing body has made such a determination, the claimant cannot complain.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 23, 1940.

Hon. William D. Peeler,
Register in Chancery,
Lauderdale County,
Florence, Alabama.

Registers in Chancery—Separate Sales—Commissions—

Where property is sold by the register pursuant to decree in separate parcels, the register's commissions cannot be computed separately on each such parcel. (Code of Alabama, 1923, Section 7283). Only one commission is allowable.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated December 27, 1939, which follows:

"Please advise me as soon as possible whether I should figure my commission on the sales as a whole or separately under the following circumstances:

"By virtue of a decree of the Court, I was ordered to sell certain real estate in four separate tracts and not as a whole. This property could not be sold as a whole because the interests of the parties did not appear to be equal in each of the parcels. The property was sold to four different parties and it was necessary that the costs and interests of the parties be figured separately in each of the four parcels of the property sold.

"I figure my commission as Register on each of the parcels separately, on the theory that had the Court ordered the sales to be made

on separate occasions, I would have necessarily had to figure the commission separately.

"Please advise me if this is correct."

From the foregoing statement, it appears that under one decree four separate and distinct sales were made pursuant to the terms of the decree. I am of the opinion, however, in the absence of express statutory authority therefor, that only one commission is payable out of the proceeds of the four sales.

Section 7283 of the Code of Alabama, 1923, provides in part as follows:

"Section 7283. Fees allowed to registers.—Registers are entitled to the following fees for the following services:

* * * *

"Commissions on sales: For the first one hundred dollars, two per cent; for all over one hundred dollars, and not exceeding one thousand dollars, one and one-half per cent; for all over one thousand dollars and not exceeding twenty thousand dollars, one per cent; and for all over twenty thousand dollars, one-fourth of one per cent. For receiving, keeping and paying out or distributing money, other than that arising from sales, on the first one thousand dollars, one per cent; on all over one thousand dollars and not over five thousand dollars, three-fourth of one per cent; on all over five thousand dollars, not exceeding ten thousand dollars one-half of one per cent; and all over ten thousand dollars, one-fourth of one percent; receiving, keeping, and paying out money paid into court under a decree in favor of an administrator ad litem, one-half of one per cent on the amount so received and paid out; for each notice sent by mail to creditors under articles 1 (1) and 2 (2) of chapter 350 (145) . . . 15".

Only such costs, fees, commissions and allowances are payable as are expressly and specifically authorized by statute. Code of Alabama, 1923, Section 3734. In the present instance, as there was only one decree of sale entered in the cause, only one commission can be paid, although the property was sold in separate parcels and to different purchasers. I am unable to find any court decision or any ruling of this office holding otherwise.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Hon. Herschel C. Smith,
Sheriff, Lamar County,
Vernon, Alabama.

January 23, 1940.

Sheriffs—Guard Allowances—

1. Under the provisions of Section 3741 of the Code of Alabama, 1923, where a person is committed to jail to await confession of judgment or transfer to the State penitentiary, sheriff is entitled to guard allowance.

2. Sheriff entitled to guard allowance each time prisoner is lawfully committed to jail.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Section 3741, Code 1923, Vol. 2, Page 199, provides as follows:

"For guarding each prisoner lawfully committed to jail in the following cases:

In all felony cases whether convicted or not.....	\$2.00
In all arrests under indictment whether convicted or not.....	2.00
In all other cases where conviction follows arrest.....	2.00'

"Question (1). In the event the party charged has been under bond for appearance, and in court is convicted and sentenced to pay a fine and cost, or is sentenced to serve time, and then is placed in jail awaiting confession of judgment or transfer to prison, does this meet the requirements of lawful commitment, and, if so, is the jailer or sheriff entitled to guard fee for same?

"Question (2). In the event party is arrested, placed in jail and later makes bond for appearance in court, and on this appearance is found guilty and committed into the care of the Sheriff for any disposition on the judgment of the court, and is placed in jail, is the sheriff or jailer entitled to guard fee?"

This office has heretofore ruled on the question presented in your first inquiry. In an opinion rendered to Hon. B. P. Singleton, Chief Examiner of public Accounts, under date of January 17, 1940, this office ruled that under the facts presented in your inquiry the sheriff would be entitled to a guard allowance. This question is dealt with in answer to the fifth question presented in the Singleton opinion. A copy of this opinion is enclosed for your convenience.

In answer to your second inquiry, I am of the opinion that the sheriff would be entitled to two guard allowances. See Biennial Report of the Attorney General, 1928-30, page 194; Quarterly Report of the Attorney General, Vol. II, page 118, subheads, 18, 19 and 20.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 24, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Sheriffs—Guard Allowances—

1. Sheriff entitled to guard allowance provided by Section 3741 of the Code of Alabama, 1923, each time he lawfully commits prisoner to jail under legal process.

2. Sheriff's fee cannot be paid out of fine and forfeiture fund of county until the case is finally disposed of or the conditions of Section 4039 of code of Alabama, 1923, complied with.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter requesting my opinion as follows:

"Please advise me as follows:

"1. A person is arrested by the Sheriff on a warrant charging Grand Larceny and on preliminary hearing the examination is adjourned to a later date and upon failure to make bond the person is committed to jail. Prior to the date set for such examination, the Grand Jury returns an indictment for said offense and the Sheriff holds the person in jail to answer the indictment. On the trial of the case in the Circuit Court the person pleads guilty and the Court sentences him to one year in jail, the Sheriff commits him to jail to serve the sentence.

"Taking into consideration the case as reported in 124 Ala. 102 and the facts as presented would the Sheriff be entitled to a Guard Fee of \$2.00 for guarding such person under commitment on preliminary? Would the Sheriff be entitled to another Guard Fee of \$2.00 for guarding such person under the indictment prior to trial? Would the Sheriff be entitled to another Guard Fee for guarding such convict during the time he served the sentence imposed by the Court? In other words, would the Sheriff earn three (3) fees for guarding the same person held for the same offense, such person being held in jail from the first commitment to the end of the period of his sentence, but being held under three different conditions, namely; under commitment on adjournment of preliminary examination, under an indictment for such offense and under sentence as pronounced by the Court?

"2. A person is arrested by the Sheriff on a warrant charging Burglary and on preliminary examination is bound over to the Grand Jury and on failure to make bond is committed to jail. The Grand Jury indicts such person for said offense and the Sheriff holds him in jail to answer the indictment. When the case is tried he is found guilty and sentenced to the penitentiary, the Sheriff commits the convict to jail to hold until delivered to the penitentiary officials.

"Taking into consideration the facts presented, would the Sheriff earn three fees for guarding the same person held for the same offense, such person being held in jail from the first commitment to the time he was delivered to the penitentiary officials, but being held under three different conditions, namely; under commitment, on failure to make bond, after preliminary examination, under an indictment for such offense and held for delivery to the penitentiary officials?"

"3. In the event your answer to question No. 2 is in the affirmative should the Convict Department pay to the Sheriff \$3.00 under Section 3667, Code of 1923, 'For committing prisoners to jail, one dollar'?"

"4. A person is arrested by the Sheriff on a warrant charging a felony and, on preliminary hearing, the examination is adjourned to a later date, such person being released under bond by the magistrate. On the day set for hearing of the adjourned examination such person fails to appear, forfeiture is had on the bond but the person is never rearrested.

"Taking into consideration the case as reported in 124 Ala. 102 and the facts as presented, would the fees of the Sheriff, such as arrest, guard fee, service of subpoenas, etc., be a legal charge against the Fine and Forfeiture Fund?"

My answer to the first part of your first inquiry is in the affirmative. See Biennial Report of Attorney General, 1928-30, page 194.

Section 3741 of the Code of Alabama, 1923, reads in part as follows:

"Sheriffs are entitled to the following fees and allowances in criminal cases—that is to say: * * *

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not..... \$2.00

"In all arrests under indictment whether convicted or not..... 2.00

"In all other cases where convictions follow arrests..... 2.00"

The Supreme Court in the case of *Stone, Treasurer v. State ex rel Holcombe*, 197 Ala. 293, 72 So. 536, held that a sheriff was entitled to guard allowance for prisoners committed to the county jail from inferior courts of the county. The fact that the prisoner was committed from an inferior court pending preliminary hearing, would not, in my opinion, change the situation—the prisoner was lawfully committed to jail on a warrant charging a felony and under the authority of the *Stone* case, *supra*, the sheriff would be entitled to the guard allowance provided for by Section 3741.

My answer to the second part of your first inquiry is in the negative.

Under the facts presented, the prisoner was in the custody of the sheriff from the time of the first commitment, and was never released on bond.

The grand jury indicted such person, but he was never committed to jail on this indictment, for the simple reason he was already in jail, being held on a warrant charging grand larceny. The allowance provided for by Section 3741 is in truth and in fact a "turnkey" allowance, and, in my opinion, a person must be actually and lawfully committed to jail before such allowance accrues.

My answer to the third part of your first inquiry is in the affirmative. See Biennial Report of Attorney General, 1928-30, page 194; Quarterly Report of Attorney General, Vol. II, page 118, subheads 18, 19 and 20.

An application of my answer to your first inquiry will answer your second inquiry. Your second inquiry does not, in my opinion, present any different situation from the one presented in your first inquiry. In other words, under the facts presented in your second inquiry, the sheriff would be entitled to two guard allowances.

My answer to your third inquiry is in the affirmative. However, it will be noted that the Department of Corrections and Institutions should pay only two dollars as provided by Section 3667, Code of 1923, as I have eliminated one of the guard allowances inquired about in your second inquiry. Quarterly Report of Attorney General, Vol. II, page 118, subhead 19.

My answer to your fourth inquiry is in the negative.

Before any officer's fees are payable out of the fine and forfeiture fund as provided by Section 4039, Code of Alabama, 1923, there must be some final disposition of the case, or the conditions of Section 4039, *supra*, must have been met. Under the facts presented in your inquiry, there could be no final disposition of this case and neither have the conditions of Section 4039 been met, therefore, fees of officers would not be a legal charge against the fine and forfeiture fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 25, 1940.

Hon. E. E. Gewin,
Tax Assessor,
Hale County,
Greensboro, Alabama.

Corporations—Corporations organized under Act No. 220, H. 275, approved July 17, 1935, (Gen. Acts, 1935, p. 604), are exempt from ad valorem taxation to the extent provided in Section 15 thereof. Said exemption includes tractors, machinery and terracing equipment purchased or acquired by such a corporation for its own use or for the use of and benefit of its members for strictly agricultural or farm purposes in this State.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 19, 1940, in which you request my opinion as follows:

"We have in Hale County an agricultural Association incorporated, existing, and operating under the provisions of House Bill No. 275, Page 604, General Acts of 1935, Regular Session.

"Under Section 15 of this Act, the payment of Ad Valorem taxes by such Associations is provided for. Certain property owned by the Corporation is exempt from taxation under this Section.

"Please advise whether these Associations operating under this Act, in order to comply with Section 15, should pay ad valorem tax on tractors, machinery and terracing equipment which they have purchased or acquired for its own use or use and benefit of its own members for strictly agriculture or farm purposes."

In answer to your inquiry, it is my opinion that the corporation in question is exempt from ad valorem taxation on the tractors, machinery and terracing equipment which were purchased or acquired by it for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this State.

The corporation in question was incorporated under the provisions of Act No. 220, H. 275, approved July 17, 1935, (General Acts, 1935, p. 604). Section 15 of said act provides as follows:

"Section 15. Any corporation or association organized hereunder shall pay to the State the annual permit fee of ten dollars now required by law, and shall pay all ad valorem taxes on its real and personal property, except that all cotton and all other agricultural products which have been raised or produced in the State of Alabama, title to which may be held by such corporation or association in its own right or for the use and benefit of its members, and all goods and articles purchased or acquired by such corporation, whether in or out of the State for its own use or for the use and benefit of its members for strictly agricultural or farm purposes in this State, shall, so long as held by such corporation or association, be exempt from taxation; nor shall such corporation be liable for any other license or privilege fee or tax for the purpose of engaging in or transacting business, or otherwise, in this State." (Emphasis supplied)

The emphasized portion of the above quoted section is applicable to the matter of your inquiry—see **Biennial Report of Attorney General, 1936-38, p. 182.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 25, 1940.

Hon. E. W. Vance,
Member, Board of Revenue,
Barbour County,
Eufaula, Alabama.

Counties—Expenses of sheriff's investigation of crime—

Reasonable expenses of investigation of crime made by a sheriff under Section 10190 of the Code of 1923, when approved by the authority directing the investigation, may be paid by the county, as is authorized by Section 10191.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of December 8, 1939, in which you request my opinion as follows:

"As a member of the Board of Revenue, I write you for information relative to a claim filed by the sheriff of Barbour County for and on account of services rendered to said Sheriff by Dr. G. O. Wallace, a physician of Clayton, Alabama. Section 10190 of the Code of 1923 authorizes the Solicitor to direct the sheriff in writing to make a special examination in cases of people found dead or who may be suspected of having come to their death by foul means.

"Recently in Barbour County, a dead man was found some distance out from Clayton, and the Solicitor by virtue of Section 10190 of the Code in writing directed the sheriff to make a special investigation of the cause. The sheriff made the necessary examination and made his report as directed by law, and he took with him a physician to make an examination. He filed a bill with the County Board of Revenue for a fee of \$10.00 for the Doctor. He travelled some eighteen miles and made the examination. The Doctor did not put in his claim for the amount allowed physicians advising coroners which the Code says shall be \$5.00 plus ten cents per mile for making the trip. His only claim was a fee of \$10.00 for services rendered the sheriff. As a member of the Board of Revenue of Barbour County I respectfully request of you an opinion as to whether or not the Board has the authority under the law to pay Dr. Wallace this sum of \$10.00 for services rendered. We think it a most reasonable charge inasmuch as it was a long trip, but we would be glad to have an opinion as to our authority for paying this \$10.00."

In my opinion, the county governing body of Barbour County is authorized to pay the claim for the services of the physician rendered in connection with an inquiry and investigation made by the sheriff, at the direction of the circuit solicitor, when the claim therefor is approved by said solicitor, as is provided by Sections 10190-91 of the Code. These sections provide:

"Section 10190. Investigations by sheriffs; reports required, to whom made.—The sheriffs in their respective counties whenever directed to do

so in writing by such solicitors or any of them, or by the attorney-general or governor, shall make special investigation of any alleged violation of the law in their counties, and shall prepare a written report setting forth what information has been obtained as a result of such investigation together with the names of such witnesses as have been secured with a summary of what can be proven by such witnesses, which report shall promptly after its preparation be presented to the solicitor who directed the investigation or to the attorney-general or to the governor when they have directed the investigation and in the latter event the governor or attorney-general may present it to any solicitor prosecuting criminal causes in the county. The sheriff of the county shall proceed promptly by himself or by a competent deputy of experience and fidelity to make such investigation when directed as aforesaid.

"Section 10191. Expenses of investigations, how paid.—The expenses of such investigation when so ordered shall be paid from the county treasury, upon warrant properly drawn; and after the report is made the sheriff shall file with the board of revenue or court of county commissioners a detailed sworn statement of his expenses accompanied by the written approval of the officer directing the investigations, and the board of revenue or court of county commissioners shall audit and allow only so much thereof as it shall find reasonably necessary unless it is approved by the governor or attorney-general, in which event they shall allow the amount approved, and for such investigation in addition to his expenses which may include any actual cost of travel that was necessary, the sheriff shall be allowed a fee of four dollars, but if the investigation consumes one day or less, then a fee of two dollars, and the fee and allowed expenses must be paid in each case from the county treasury upon a warrant drawn according to law. Every such solicitor shall direct the sheriff to make such investigation and report when a written request to that effect setting forth the alleged violation of the law is presented to him signed by twenty-five reputable citizens of the county."

Of course, in the absence of a statute providing for reimbursement of the sheriff for expenses incurred in the performance of his official duties, the county is not liable for the payment of such expenses. The rule is stated in 57 C. J. 1134, Section 1208, as follows:

"A county is liable to a sheriff * * * for his * * * expenses in connection with enforcement and execution of criminal or penal laws when, and only when, there is an applicable statute so providing, and where the case is within the statute imposing liability on the county, but there is an applicable statutory limitation of the amount of liability, the county will be held liable within, although not beyond, the prescribed limitation."

In my opinion, Section 10191, *supra*, affords ample authority for the payment of the expenses reasonably and necessarily incurred by the sheriff in making the inquiry and investigation directed by the circuit solicitor. Of course, the sheriff is not given unbridled discretion as to the extent or the types of the services which he will employ in making the inquiry and investigation. The power is lodged in the county governing body to audit the claim for such expenses, after it is approved by said solicitor. This vests in the county governing body the duty to determine whether or not the services for which reimbursement is claimed were reasonably necessary to the conduct of the investigation. If such services were reasonably necessary the court has ample authority to audit and allow a claim therefor.

I have been unable to find a case directly in point decided by the courts of Alabama. However, the general principles applicable, together with decisions from courts of last resort in other states, support the conclusion. A typical case, construing a similar statutory provision, is *Nicely v. Madera County*, 296 P. 306, 111 Cal. App. 731.

The holding here announced is not made without due consideration of the duties imposed by the Code of 1923, Section 4557, upon coroners to investigate cause of death when there is reasonable ground for belief that such death has been occasioned by the act of another by unlawful means. It is my opinion that the duty here imposed upon the sheriff is cumulative and sufficient authority for payment of the expenses of the sheriff's investigation, including a reasonable fee for a physician, is found in the provisions of Section 10190 and 10191 of the Code of 1923, when these provisions are strictly followed.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 25, 1940.

Mrs. Marie B. Owen, Director,
Department of Archives and History,
Capitol.

Construction of Section 7 of Act No. 171, H. 327, approved
March 17, 1939.

Opinion by Assistant Attorney General Russell.

Dear Madam:

This will acknowledge receipt of your request for official opinion dated November 3, 1939, which reads as follows:

"Will you please advise me if the Public Library Service Division in the Department of Archives and History may accept agreement to receive aid and advice, from library boards and/or governing bodies, in counties where there is a city having a population of not less than 65,000."

Subsequent to receiving your request for official opinion, you have advised that the question you want answered is whether or not the words "shall it except by agreement affect or apply" are impliedly a part of the last main clause of Section 7 of Act No. 171, H. 327, approved March 17, 1939, so as to allow the Public Library Service Division to accept agreement to receive aid and advice, from library boards and/or governing bodies, in counties where there is a city having a population of not less than 65,000.

Section 7, supra, is as follows:

"Section 7. This Act shall in no way affect the administration and supervision of public school libraries which have been or may hereafter be established by aid through the State Department of Education, except by agreement, nor shall this Act affect in any way the administration and supervision of public school libraries under the control of any city or county board of education except by agreement; nor shall it except by agreement affect or apply to libraries of institutions of higher learning; nor free public libraries in counties where a city having a population of not less than 65,000 already maintains a free public library."

It is my opinion that the Public Library Service Division of the Department of Archives and History may accept an agreement to receive aid and advice from library boards and/or governing bodies in counties where there is a city having a population of not less than 65,000.

It will be noted that the above section provides that the Act creating the Public Library Service Division shall in no way affect or apply to, except by agreement, the administration and supervision of the first three types of library service enumerated in said section, supra, but the words "shall it except by agreement affect or apply" do not appear in the last main clause of said section which refers to free public libraries in counties where a city having a population of not less than 65,000 already maintains a free public library. This immediately raises the question as to whether or not the words "shall it except by agreement affect or apply" are impliedly a part of the last main clause. If this is true, then the Public Library Service Division will have, subject to agreement, the same powers in regard to free public libraries in counties where a city having a population of not less than 65,000 already maintains a free public library as it does, by agreement, with the first three types of library service enumerated in Section 7, supra.

In 59 Corpus Juris, Section 589, page 989, we find the following statement:

"The ordinary rules of grammar will be applied for the purpose of ascertaining the meaning of a statute, but are not controlling when an intent in conflict therewith is disclosed, and must thereupon be disregarded as to effect the legislative intention, as they cannot be allowed to defeat the legislative intent as expressed in the statute construed as a whole and in connection with other acts in *pari materia*. They may, however, influence a doubtful case and are controlling when there is nothing in the statute not in accord with them. Where established rules of grammar have been followed, the court will not be influenced by refinements of rhetoric which might justify a different construction."

It will be noted from a reading of the above quoted excerpt that the use of the ordinary rules of grammar are permitted in ascertaining the meaning of a statute, provided that in doing so the legislative intent is not defeated. In my opinion, however, based upon a reading of the Act as a whole, it was the intention of the legislature that the administrative authorities of all four types of library service enumerated in Section 7, supra, should

have the right to enter into agreements with the Public Service Library Division.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 25, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

1. Counties—Authority to contract—Court of county commissioners without authority to purchase book containing abstracts of title to lands located in the county for use of the general public.

2. Probate Judge—Liability for issuance of warrant drawn on county treasurer without authority of law.

Probate Judge liable on his official bond for warrants issued by him without authority of law upon which such warrants county funds are expended, notwithstanding county governing body had audited and allowed claim therefor.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of November 28, 1939, in which you request my opinion as follows:

"Under date of December 13, 1937 the Commissioners Court of Winston County, by Resolution, authorized the purchase of a set of abstract books to be placed in the office of the Judge of Probate for the use of the general public. Since such date a part of the purchase price, covered in this contract, has been paid by the County.

"In closing examination for the year 1937-38 we were advised by the Judge of Probate of Winston County that a request for an opinion as to the legality of this item had been made. I am unable to find a ruling by the office of the Attorney General covering this item.

"In the event this matter has been submitted to your office and officially answered, will you please furnish me with a copy of such opinion. In the event no opinion has been rendered since December 13, 1937, relative to such item, will you please advise me as follows:

"1. Is the purchase of such abstract books a legal expenditure of County funds?

"2. In the event same is not a legal expenditure of County funds, would the Probate Judge and his official bond be liable for the amount paid to date on the purchase of such books?"

In reply, you are advised that the records of this office disclose that a request for an official opinion on the question of whether or not abstract books dealing with title to all lands located in Winston County and placed in the office of the Judge of Probate for the use of the general public, legally may be paid for from county funds, was received under date of May 4, 1939, from Hon. Frank M. Johnson, Judge of Probate, Winston County, and was withdrawn by Judge Johnson under date of June 1, 1939. No opinion of this office on your specific question appears on record.

In reply to your question numbered one, I advise you that, in my opinion, no authority of law exists for the purchase of such abstract books. Inasmuch as the court of county commissioners is a creature of statute and possesses only such powers as are specifically granted by statute, or necessarily implied therefrom, in the absence of authority for the purchase of such books, it is my opinion that the expenditure therefor legally cannot be made. There is no such statutory authority.

In *State ex rel Towle v. Stone, County Treasurer*, 236 Ala. 82, 181 So. 281, Mr. Justice Gardner, speaking for the Supreme Court, quoted with approval the statement made by the court in *Board of Revenue and Road Commissioners of Mobile County v. State ex rel Drago*, 172 Ala. 155, 54 So. 995, as follows:

"The law of this state (however it may be in other jurisdictions) is long and well settled that counties are governmental agencies of the state, and that they are therefore chargeable with and liable for those claims or demands—and those only—which the law imposes upon them, or empowers them to contract for. No officer can charge the county with the payment of any claim due him, however meritorious or whatever benefit the county may derive therefrom, unless expressly or by necessary implication authorized by law" (Citing cases).

Assuming that at the time of the issuance of the warrants here considered the power to draw warrants on the county treasury of Winston County was exercised by the Probate Judge, it is my opinion that your second question must be answered in the affirmative. The Judge of Probate is liable on his official bond for warrants issued by him without authority of law, notwithstanding the fact that the claims upon which they are based have been audited and allowed by the court of county commissioners. See Biennial Report of the Attorney General, 1936-38, at page 647, with authorities cited therein; Quarterly Report of the Attorney General, Vol. XIV, page 80.

Section 321 of the Code of Alabama, 1923, provides:

"Section 321. Warrants, how drawn.—All warrants drawn upon the depository must be signed by the probate judge of said county or the president of the board of revenue or court of county commissioners of the different counties at the election of such board of revenue or court of county commissioners, expressed in a resolution which must be spread upon the minutes and given to such depositories that may be selected. Such officer signing such warrants shall be liable for the amount of any

warrant drawn and paid by such depositories without the authority of law."

The language of the last sentence of the section quoted next above is clear and unequivocal. It specifically imposed upon the officer, who is vested with the authority to draw warrants upon county funds, liability for the amount of any warrant drawn and paid, **without authority of law**. The only condition attached to the liability is that the warrant be drawn and paid "without authority of law." It is not conditioned upon whether or not the governing body of the county has undertaken by official action to audit and allow the claim upon which the warrant is issued. The liability imposed is absolute. Although statutes imposing penalties must be strictly construed, they ought not to be construed in such manner as to do violence to the plain and unequivocal meaning and intention expressed therein.

It will be noted that Section 321 of the Code was enacted into law as a part of Section 5 of Act No. 378, General Acts, 1915, page 348, approved September 15, 1915, which act deals principally with county depositories in lieu of county treasurers, and is applicable in all counties (not having a local statute which controls) of not more than fifty-five thousand population. The population of Winston County, as shown by the official census of 1930 was 15,596. A county treasurer is appointed by the county governing body of Winston County under the authority of Section 322 of the Code, 1923.

However, in the case of **Carnley v. Moore**, 214 Ala. 114, 106 So. 604, the Supreme Court applied Section 321 to the facts there under review, arising in a county (Coffee) which then had a controlling local statute providing for a county treasurer as contra-distinguished with a county depository in lieu of county treasurer. Apparently the court, in that case, determined that the legislative intent was that Section 321 imposing liability upon the officer drawing warrants upon county funds without authority of law was applicable to counties in which the county funds were in the custody of a county treasurer as well as to counties in which the county funds were in the custody of a county depository in lieu of a county treasurer.

In that case the court said:

"Section 321 of the Code of 1923 provides:

"Such officer (judge of probate) signing such warrants shall be liable for the amount of any warrant drawn and paid by such depositories without the authority of law."

"But section 224 of the Code of 1923, states the court of county commissioners must in term time audit all claims against the county, and every claim or such part thereof as is allowed must be registered in a book kept for that purpose, and the judge of probate must give the claimant a warrant on the treasury for the amount so allowed. If the claim allowed is one legally chargeable against the county, then the judge of probate may be compelled by mandamus to issue the warrant to the claimant (owner) on the treasury for the amount allowed. *Commissioners' Court v. Moore*, 53 Ala. 25; *Jack v. Moore*, 66 Ala. 184. In *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 578, 17 So. 113, this court said:

"The audit and allowance of claims against the county is the exercise of administrative or executive, not of judicial, power. If the record should show affirmatively that the court had allowed a claim not legally chargeable on the county, the allowance of which was an excess of the authority with which the court is intrusted, the allowance would be void. * * *"

Based upon the case cited next above, it is my opinion that when a Judge of Probate of a county having a population of less than 55,000 population, who is authorized by law to draw warrants on the county treasury, draws a warrant in payment of a claim not authorized by law, which claim has been audited and allowed by the county governing body of the county, upon which warrant county funds are paid out, he and the sureties on his official bond are liable to the county for the loss sustained by reason of the issuance of such a warrant.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 25, 1940.

Hon. James B. Little,
Superintendent of Banks,
State of Alabama,
Capitol.

Banks and Banking—Capital Stock—

A bank is violating Section 6336 of the Code of Alabama, 1923, as amended, if it retires part of its capital stock thereby reducing the amount of its capital stock below the minimum requirements of said section.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion under date of December 11, 1939, which reads as follows:

"Request is hereby made of you for a ruling on the questions presented herein, which questions arise under Section 6336 of the Code of Alabama or Acts of 1931, page 392.

"'Bank' doing business in a city of five thousand (5,000) population has a paid in capital of Fifty Thousand (\$50,000.00) Dollars, the stock of said corporation being divided into two classes, Preferred and Com-

mon, outstanding Preferred being in the sum of Twenty Five Thousand (\$25,000.00) Dollars and outstanding Common being in a like sum. The entire issue of Preferred Stock is owned and held by the Reconstruction Finance Corporation. From its earnings, the bank, under agreement with the Reconstruction Finance Corporation, retires Five Thousand (\$5,000.00) Dollars of its Preferred Stock. Thereupon a 'Bank' sets up and maintains a reserve in the sum of Five Thousand (\$5,000.00) Dollars represented on its books by an account entitled 'Reserve for Dividends Payable in Common Stock.'

"1st. Does the above procedure meet the requirements of Section 6336 of the Code of Alabama with reference to capital stock actually paid in?

"2nd. Do the facts outlined herein have the effect of reducing the capital stock set-up of 'A Bank' in contravention of Section 6336?

"3rd. By the setting up and maintenance of such reserve account, does 'A Bank' meet the minimum requirements of Section 6336 of the Code of Alabama or by such procedure would the bank be construed to be a Trustee for the benefit of its stockholders with reference to the amount carried and maintained in such reserve fund, and on this theory meet such minimum requirements as to the paid-in capital?"

In reply to your several inquiries, I first call attention to Section 6336 of the Code of Alabama, 1923, as amended by Act No. 335, H. B. 215, approved July 2, 1931, which is as follows:

"6336. Capital stock of banks.—No bank hereafter organized under the laws of Alabama shall have a capital stock, actually paid in, less than the following: in cities, towns and villages of less than three thousand population, \$25,000.00; in towns and cities of three thousand to six thousand population, \$50,000.00; in cities and towns of six thousand to fifty thousand population, \$100,000.00; in cities of over fifty thousand population, \$200,000.00. For the purposes of this section the last preceding federal, state or municipal census may be used."

It will be noted that the above section requires banks, organized after the enactment of said amendment, *supra*, in cities and towns of three thousand to six thousand population to have a capital stock of not less than \$50,000.00 actually paid in and the capital stock of banks falling within this classification cannot be reduced below the minimum set out in said section, *supra*. See Section 6341 of the Code of Alabama, 1923, as amended by Act No. 617 H. B. 1071, approved August 4, 1931, pp. 757, 758, which section deals with the increase and decrease of capital stock of state banks and particularly that part of said section which is as follows:

"In no case, however, shall the capital stock of a bank be decreased below the minimum amount required by law for the incorporation of banks in this State."

At this point, I call your attention to the fact that Act. No. 335 H. B. 215, approved July 2, 1931, amending Section 6336, changed materially the

provisions thereof. For the purpose of this opinion, I am assuming that the bank here under consideration is subject to the provisions of Section 6336, as amended.

In Michie on Banks and Banking, Vol. 2, Section 2, page 6, the following statement is found.

"The capital stock of a bank is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation, to be used in trust for the benefit of the members. **If a large surplus be accumulated and laid by, that does not become a part of it.**" (Emphasis supplied)

Also in Michie on Banks and Banking, Vol. 2, Sec. 2, page 6, is found the following statement:

"'Capital' and 'Capital Stock' of a bank, while sometimes used interchangeably, are not one and the same thing. 'Capital' includes the entire assets of the bank whether represented by money paid in for stock, surplus, undivided profits or other property of the bank, while 'Capital Stock' represents only the total amount derived from the issuance of shares of stock." Citing: *West v. Newport News*, 104 Va. 21, 51 S. E. 206.

Applying the above principles of law to the facts set forth in your inquiry, it will be seen that when "A Bank" retires Five Thousand (\$5,000.00) Dollars of its Preferred Stock, owned and held by the Reconstruction Finance Corporation, the Capital Stock of said bank has been reduced below the minimum requirements of Section 6336, supra. The fact that "A Bank", at the time of retiring the Capital Stock held by the Reconstruction Finance Corporation, sets up and maintains a reserve in the sum of Five Thousand (\$5,000.00) Dollars, represented on its books by an account entitled "Reserve for Dividends Payable in Common Stock", would not remedy the situation as the reserve fund would represent "Capital" but not "'Capital Stock'".

Premises considered, it is my judgment, based upon the conclusion heretofore reached, that your specific inquiries should be answered as follows:

1. Your first inquiry should be answered in the negative.
2. Your second inquiry should be answered in the affirmative.
3. Your third inquiry should be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 25, 1940.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Board of Revenue—Hospitalization of indigent persons—

Under Section 1201 of the 1923 Code, as amended, Board of Revenue or like governing bodies authorized to contract for hospitalization of indigent tubercular persons within the county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of December 5, 1939, which follows:

"I request your opinion upon the following:

"We have recently organized in this county a Houston County Tuberculosis Association organized for the purpose of furnishing treatment to indigent patients suffering from tuberculosis, by paying a maximum of \$1.00 per day per patient during the time that they are confined in the Montgomery County Tuberculosis Sanatorium.

"The Community Chest of Dothan contributes \$500 per annum to the work of the Tuberculosis Association. Payment for treatment is limited to persons who are residents of Houston County, Alabama.

"We anticipate that if Houston County, acting alone, furnishes the necessary hospitalization to indigent residents of the county suffering from tuberculosis, that the cost thereof would exceed \$500 per annum. It has been proposed to the county that, in lieu of acting alone, it contract with the Houston County Tuberculosis Association, and pay \$500 for the purpose of furnishing treatment in the Montgomery Sanatorium to indigent residents of Houston County who are suffering from tuberculosis.

"Payment will not be made for the treatment of any patient until the necessity for his treatment is certified by the County Health Officer of Houston County, nor until his indigency is certified by the County Director of Welfare of Houston County.

"Will you please advise if, under any provision of law, Houston County is authorized to pay to the Treasurer of the Houston County Tuberculosis Association the sum of \$500 per annum, which sum, together with monies furnished by the Community Chest of Dothan and by other sources will be used exclusively for the purpose of furnishing treatment and hospitalization to indigent residents of Houston County suffering from tuberculosis?"

As I understand the question propounded in the above request, you wish to know whether or not the Board of Revenue of Houston County may contract with the Houston County Tuberculosis Association to pay \$500 for the hospitalization of indigent resident of Houston County, who are suffering from tuberculosis.

In my opinion, your request should be answered in the affirmative.

Your attention is called to Section 1201 of the Code of Alabama, 1923, as amended by Act No. 340, H. 636, approved November 9, 1932 (General Acts, 1932, page 335), which section reads as follows:

"1201. The board of revenue or court of county commissioners of any county in this state may make an appropriation or appropriations out of their respective county treasury to aid in maintaining and taking care of sick and wounded persons who are unable to provide for themselves in any hospital maintained in their respective counties exclusively for the care of the sick and wounded."

It will be noted from the above quoted Code section that the Commissioners' Court or Boards of Revenue of counties may make appropriation out of their respective county treasuries to aid in maintaining and taking care of sick and wounded persons who are themselves financially unable to pay for hospital treatment in hospitals maintained in the county of the patient's residence. This quoted Code section is in my opinion specific authority for the right of the Board of Revenue of Houston County to appropriate county funds and to contract with the Houston County Tuberculosis Association for the hospitalization of indigent tubercular patients, and is also authority for the Board of Revenue of Houston County to appropriate necessary funds to carry out the terms of the contract entered into by and between Houston County and the Houston County Tuberculosis Association. See opinions, Biennial Report of Attorney General, 1934-36, page 68; Biennial Report of Attorney General, 1936-38, page 447.

In my opinion the words "in any hospital maintained in their respective counties" are used in the statute as a measure of the indigence of the patient. That is to say, the test is "is the patient able to provide for or maintain himself while sick in any hospital maintained in the county of his residence?" The quoted words cannot be taken as a limitation upon the hospitals in which patients may be treated. This for the obvious reason that it is possible that in some of the smaller counties there is no such hospital maintained. The legislature could not have intended to make such a discrimination.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 25, 1940.

Hon. Jeff D. Smith, Solicitor,
Twenty-third Judicial Circuit of Alabama,
Huntsville, Alabama.

Sunday violations—Restaurants—

Person operating on Sunday a restaurant in which there is a victrola which is operated by placing a nickel in the slot and floor space on which to dance does not violate Section 5539 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter in which you request my opinion as follows:

“Re:Code Section No. 5539.

“In Madison County we have a number of road houses which have cafe licenses. These road houses usually have some four or five tables on which sandwiches are served together with cold drinks. They also maintain a large floor space and a victrola which plays one piece of music upon the deposit of five cents in a slot.

“I would appreciate your advising me whether or not a proprietor of a road house of this type is violating Section 5539 if he keeps his place of business open on Sunday and permits his patrons to dance therein after depositing five cents in a victrola. It is my understanding that a person has a right to keep his cafe open on Sunday, but only to serve food to his patrons.”

Section 5539 of the Code of Alabama, 1923, is as follows:

“Section 5539. Certain acts prohibited on Sunday; punishment.—Any person who compels his child, apprentice, or servant to perform any labor on Sunday, except the customary domestic duties of daily necessity or comfort, or works of charity; or who engages in shooting, hunting, gaming, card playing, domino playing, or racing on that day; or **who, being a merchant or shopkeeper, druggist excepted, keeps open store on that day,** must be fined not less than ten nor more than one hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not more than three months; but the provisions of this section do not apply to the running of railroads, stages, or steamboats, or other vessels navigating the waters of this state, or any manufacturing establishment which requires to be kept in constant operation. Nothing herein shall prevent the sale of gasoline or other motor fuels or motor oils on Sunday.” (Italics supplied)

It is one of the fundamental principles of statutory construction that a penal statute must be strictly construed. There is no question but that the above quoted statute is penal in its nature and, therefore, must be given a strict construction. *Flanagan v. Myer & Co.*, 41 Ala. 132.

You are correct in your statement that the above quoted section does not prevent the operation of a restaurant on Sunday. The mere fact, however, that an individual operates a restaurant does not entitle that individual to engage in other pursuits on Sunday prohibited by Section 5539. The question as to whether or not the operator of a restaurant is engaging in acts prohibited by Section 5539 is a question of fact to be determined by the jury. *Whittaker v. State*, 17 Ala. App. 624, 88 So. 188.

I do not find any decision of our Supreme Court which is in any way helpful in determining whether or not the words "a merchant or shopkeeper" as used in Section 5539 would include one who operates a dance hall.

It is my opinion, however, that in view of the fact that the statute must be strictly construed that the appellate courts of this state would not apply the words "a merchant or shopkeeper" to the operator of a dance hall.

This opinion is not to be understood as in any way affecting your right to proceed against the parties whom you have in mind, but it is merely my opinion expressed in answer to your request.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 26, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Taxation—Exemption—

Motor vehicles owned by the Aluminum Ore Company of Mobile, whether trucks used for hauling raw materials to, and manufactured products from, the factory, or passenger vehicles used by officials of the company, held not exempt from ad valorem taxation under Section 4 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of October 10, 1939, in which you request my opinion as follows:

"The tax assessor of Mobile County has made inquiry as to whether or not automobiles owned by the Aluminum Ore Co. of Mobile are exempt from ad valorem taxes under the provisions of Section 4 of the 1935 Revenue Act. Inasmuch as the former Attorney General directed a letter to McCorvey, McLeod, Turner & Rogers dated October 22, 1938, dealing with this subject and inasmuch as this office is of the opinion the the only exemption accorded by Section 4 is the exemption of the property constituting the factories and manufacturing plants of the taxpayer, we find it necessary to ask your formal opinion as to whether or not automobiles and motor trucks owned by the Aluminum Ore Co. would be exempted from ad valorem tax.

"It is our information that there are two classes of motor vehicles involved, one constituting trucks used for hauling raw materials and manufactured products and the other representing passenger vehicles used by the officials of the company."

Section 4 of the 1935 Revenue Act reads as follows:

"All real and personal property, except lands upon which located, of factories or plants, manufacturing calcium cyanamid (lime nitrogen), aluminum or aluminum products, shall be exempt from state, county and municipal taxation for ten (10) years after the beginning of the construction of such plant or factory."

If the motor vehicles owned by the Aluminum Ore Company of Mobile used in the manner described in your letter of inquiry are exempt from ad valorem taxation under the provisions of the above quoted section of the 1935 Revenue Act, it is because they are a part of the "plant" of such company. If they are not a part of the "plant" of such company, within the meaning of the above quoted section of the 1935 Revenue Act, then they are not exempt from ad valorem taxation under the provisions of said section.

A careful search of the decisions of the appellate courts of this State fails to reveal any decision as to what constitutes a "plant" within the meaning of a statute exempting such a plant from taxation. However, our sister states of Mississippi and Georgia have had occasion to consider this question. In the case of **Adams County v. National Box Co.**, 125 Miss. 598, 88 So. 168, the agreed statement of facts was as follows:

"(1) That the National Box Company is a manufacturing concern established in the city of Natchez, Adams County, Miss., subsequent to the passage of chapter 100 of the Laws of 1916, and is a factory entitled to such tax exemptions as are permitted by said act.

"(2) That attached is a copy of a communication from Robert E. Wilson, Auditor of Public Accounts, upon which the tax exemption of the National Box Company is based.

"(3) That the property assessed in this proceeding is of the value and of the kind as appears on the assessment rolls of said Adams county of the year 1920; is the property of the National Box Company, and is located in Adams county, Miss.

"(4) That the boat assessed was used exclusively by said box company in transporting logs on the Mississippi river to its plant on the bank of the Mississippi river, and was purchased exclusively for that purpose.

"(5) That said plant owns and keeps on hand only such raw materials, such as logs and the lumber, and veneer made therefrom, as is necessary for turning out its finished products, and that all of its finished product is made to fill orders given before the same is manufactured, and that all of said finished product is shipped as fast as cars can be obtained, as the same is manufactured.

"(6) That the National Box Company claims that it is exempt from the payment of all taxes for a period of five years from the date when the exemption was permitted under the provisions of said chapter 100 of the Laws of 1916, and Adams county claims that only its real estate, machinery, and equipment is exempt, and that this does not include its raw materials or finished product."

The court in deciding the question of whether or not the steamboat was exempt from taxation said:

"The exemption allowed goes only to the manufacturing plant, which includes those things necessary in and to its operation. The language of the act, 'all permanent factories or plant of the kind hereinafter named *** shall be exempt from all state, county and levee taxation,' means all of the real estate, buildings, machinery, improvements, and equipments forming a part of and belonging to the plant, or any other personal property forming a part of the plant, essential to, and necessarily used in, its operation. Exemption statutes are to be strictly construed against exemptions to persons or corporations for gain; *** .

"The steamboat used exclusively in transporting logs to the factory is not exempt from taxation because it is not a necessary part, or equipment, of the plant. It is not shown by the record that logs could not have been transported to the factory by other means, or that the plant could not have been operated without the use of the boat to transport the materials for manufacturing purposes. Those things or equipments of the plant which are exempt from taxation must be used directly in the manufacturing operations of the factory; otherwise they are not exempt. In this view it appears that the steamboat was not exempt as a necessary part of the factory." (Emphasis supplied)

We quote in extenso from the opinion of the Supreme Court of Georgia in the case of *City of Columbus v. Muscogee Mfg. Co.*, 165 Ga. 259, 140 S. E. 860:

"This brings us to consider and construe the provision of the Constitution under which this company claims that its warehouse property is exempt from taxation. This provision is as follows:

"Any person, natural or artificial, a resident of this state who may after January 1, 1924, build, equip, establish, or enlarge a plant for the manufacture or processing of cotton, wool, linen, silk, rubber, clay, wood, metal, metallic or nonmetallic mineral, or combination of same, creamery or cheese plant, or for the production or development of electricity may, as to such building, enlargement or equipment, be exempt from all county, incorporated town or city ad valorem taxes for a period of time not exceeding five (5) years from the date of the beginning of the building, equipment, or enlargement of such plants.' Acts Ex. Sess. 1923, p. 67; 13 Park's Code Supp. 1926, Sec. 6554(a).

"Before a person will be entitled to the exemption granted in this provision, he must 'build, equip, establish, or enlarge a plant' for the manufacture or processing of some one or more of the articles therein specified. If he builds or establishes a plant, such plant is exempt from taxation. The exemption includes buildings erected for and used as a part of the plant, and the land upon which they are located, and the land adjacent thereto which is necessary for their proper use, occupancy, and enjoyment, although such land may have been subject to taxation prior to the location of the plant thereon. *Mayor, etc., of Gainesville v. Brenau College*, 150 Ga. 156, 103 S. E. 164; *Hurlbutt Farm v. Medders*, 157 Ga. 258, 121 S. E. 321; *Baggett v. Georgia Conference Ass'n*, 157 Ga. 488, 121 S. E. 838. If a person has an unequipped plant and equips the same, such equipment is exempted from taxation under this provision. If the owner of an equipped plant enlarges his plant, such enlargement of the plant is exempt under this provision. So what is exempt under this provision is the building of a plant, the equipment of a plant, or the enlargement of a plant. Clearly the purchase of this warehouse property cannot be treated as the building or equipment of the cotton manufacturing plant of this company. Was the acquisition of these premises an enlargement of the plant of this company? They are not shown to be located upon the premises upon which either the old or the new mill of the company is built. While useful and used as a plant facility, they do not form a part of the plant and are not essential to and necessarily used in its operation. These warehouses are not used directly in the manufacturing operations of either factory of this company. All plant facilities, although useful and used in the operation of the plant, are not parts of such plant. These warehouses, though used in the operation of these plants of this company, are not parts of these plants. It might be otherwise if they were built upon the premises on which either of these facilities was built, and were there used for the storage of cotton to be manufactured at either of said plants, or for the storage of the manufactured products.

"The exemption allowed by this provision of the Constitution is confined to a manufacturing plant, which includes those things which are necessary in and to its operation. Its purpose is to exempt the real estate, buildings, machinery, improvements, equipment, and other personal property forming a part of and belonging to the plant, and essential to and necessarily used in its operation. *Adams County v. National Box Co.*, 125 Miss. 598, 88 So. 168; *West Chester Gas Co. v. Chester*

County, 30 Pa. 232; *Com. v. Mahoning Rolling-Mill Co.*, 129 Pa. 360, 18 A. 135; *Coatesville Gas Co. v. Chester County*, 97 Pa. 476. Such property as is directly used in the manufacture or processing of cloth or yarns by this company is exempt. Such property as is convenient but not indispensable is not exempt. *Schuylkill County v. Citizens' Gas Co.*, 148 Pa. 162, 23 A. 1055; *Bittinger's Estate*, 129 Pa. 338, 19 A. 137. These warehouses, not being upon the premises of either of the plants of this company, and not being directly used in the manufacture or processing of yarns and cloth by this company, are not exempt from city taxation under this provision of the state Constitution. They are plant facilities, but do not constitute a part of these plants. In *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194, it was held that vessels used exclusively to convey timber to sawmills were not exempt from taxation under a provision exempting from taxation 'property employed in the manufacture of articles of wood.' In *Adams v. Tombigbee Mills*, 78 Miss. 676, 29 So. 470, it was held that a statute exempting from taxation manufacturing plants, including machinery, manufactured products, raw materials, and buildings used, did not exempt buildings belonging to a manufacturing corporation which were located outside of the factory grounds and used as tenement houses for its employees. Under a statute exempting electric light plants from taxation, it was held that the exemption was limited to buildings and machinery used in generating electricity, and did not exempt poles, wires, and other property used for distributing its product. *Kentucky Electric Co. v. Buechel*, 146 Ky. 660, 143 S. W. 58, 38 L. R. A. (N. S.) 907, Ann. Cas. 1913C, 714. Under an ordinance exempting tools, implements, machinery, apparatus, or engines actually employed or used in the business of manufacturing, it was held that gasometers and gas mains and pipes of a gas company were not part of its machinery actually used in the manufacture of gas. *Consolidated Gas Co. v. Baltimore*, 62 Md. 588, 50 Am. Rep. 237.

"In *Atlanta Street R. Co. v. Atlanta*, supra, this court held: 'Under a contract between a municipal corporation and a street railroad company,' such contract being expressly authorized by the charter of the municipality, 'that "the road, rolling and live stock of said company" should be exempted from taxation, stables, shops, houses for the storage of lumber, and other like conveniences were not exempted.' So, while places of religious worship may be exempted, such exemption does not embrace a parsonage belonging to the church, in which the pastor or rector resides. *Wardens, etc. of St. Mark's Church v. Brunswick*, 78 Ga. 541, 3 S. E. 561. So, in an exemption from taxation of institutions of public charity, lands held in trust to appropriate the annual produce to the erection of a poor house and the support of its inmates forever are not exempt. *Trustees of Academy of Richmond County v. Bohler*, 80 Ga. 159, 7 S. E. 633.

"It was not the intention of the framers of this constitutional provision that a cotton factory could purchase an independent warehouse plant and hold the same free from ad valorem taxation under this provision of the Constitution. It is said that the Candler warehouses in the city of Atlanta are the largest warehouse plant in the world. Can it be held that the Exposition Cotton Mills, a cotton factory in Atlanta, could purchase his warehouse plant for the storage of cotton to be manufactured in its plants and for the storage of the finished products of its factory, and have the same exempted from ad valorem taxes under this constitutional provision? It was not the intention of the framers of

the Constitution that one independent plant could buy another independent plant and have the purchased plant exempted from ad valorem taxes under this provision. So we are of the opinion that this warehouse property is not exempt from taxation under the Constitution of this state." (Emphasis supplied)

See also **Dawkins Lumber Co. v. Caudill**, 212 Ky. 484, 279 S. W. 617.

In this connection, it might be well to point out that the lands upon which the real and personal property of the factories or plants are located are not exempt from ad valorem taxation, indicating, I think, an intention on the part of the Legislature to confine the exemption of real and personal property of such factories or plants to the real and personal property located upon the lands of such factories or plants.

It is a well-established rule in this State that statutes creating exemptions from taxation must be strictly construed in favor of the taxing power and against the person claiming the exemption; that exemptions allowed by such statutes must not be enlarged by construction; and that exemption claims not clearly within the import of such statutes must be rejected. See cases collated in 18 Alabama Digest 312, Taxation, Key No. 204(2).

The premises considered, it is my opinion that the motor vehicles of the Aluminum Ore Company, whether trucks used for hauling raw materials to, and manufactured products from, the factory, or passenger vehicles used by officials of the company, are not exempt from ad valorem taxation under the provisions of Section 4 of the 1935 Revenue Act, *supra*, for the reason that, in my judgment, they are not a part of the "plant" of the company as that term is used in said section.

In my opinion, it was not the intention of the Legislature, in enacting the above quoted section of the Revenue Act, to extend the exemption from ad valorem taxation there granted to such motor vehicles. The intention of the Legislature when ascertained is the law itself. **City of Birmingham v. Southern Express Co.**, 164 Ala. 529, 51 So. 159.

In reaching the above conclusion, I have not overlooked the decisions of the appellate courts of this State on the question of what constitutes a part of the "plant" as that term is used in the Employers' Liability and Workmen's Compensation statutes of this State. However, these statutes have been liberally construed in order to accomplish the purpose of the Legislature in enacting the same, whereas, as pointed out hereinabove, statutes affording or granting exemptions from taxation are strictly construed. In my judgment, the decisions of our appellate courts on the question of what constitutes a part of the "plant" within the meaning of the Employers' Liability and Workmen's Compensation statutes of this State do not militate against the conclusion hereinabove reached.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 26, 1940.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—Redemption—Partial Payments—

1. Where real estate is redeemed from tax sale under provisions of Section 291 of the 1935 Revenue Act, as amended, and partial payments become delinquent, such delinquent payments bear interest at 6% from date of delinquency.

2. Where several partial payments are delinquent, Probate Judge may accept payment of one delinquent payment without collecting all of such delinquent payments, until such time as the Land Commissioner exercises his option to declare all installments due and payable at once.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion, which reads as follows:

"We have on our books numerous delinquent partial payments of installment redemptions which the State Land Commissioner has not elected to satisfy through foreclosure proceedings as provided in Section 292 of the Revenue Act of 1935.

"As regards such delinquent payments:

"(1) Should we charge interest on these delinquent partial payments from the date of their delinquency to the date of their payment at the prevailing legal rate of 6%?

"(2) When several of these payments are delinquent, may we accept payment of one of such delinquent installments without collecting all of such delinquent installments?"

My answer to your first inquiry is in the affirmative.

Section 291 of the 1935 Revenue Act, as amended by Act No. 49, approved March 26, 1936 (General Acts, 1936, page 27), and by Act No. 81, approved February 3, 1937 (General Acts, 1936-37, Extra Session, page 91), provides as follows:

"Whenever any real estate has prior to January 1, 1935, been sold for taxes and bid in by the State at tax sale, the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions

shall apply: All persons having the right to redeem, such redemption shall be made as in other cases, except that the party desiring to redeem may pay the **amount of accrued taxes** in four equal installments without interest or penalties. Any person having the right to redeem any property sold to the State for taxes, and who desires to redeem under the provisions hereof, shall, before January 1, 1938, make application to the State Land Commissioner and to the Probate Judge of the county where the real estate is situated, and shall deposit with the Probate Judge one-fourth of the amount of accrued taxes without interest and penalties and annually thereafter, shall pay one-fourth of said sum to the Probate Judge until the whole amount required has been paid, and thereupon certificate of redemption shall be issued as in other cases. All laws in conflict repealed. Approved February 3, 1937."

The term "without interest and penalties," as used in the above section, in my opinion, applies to any interest and penalties which have accrued on the amount necessary to effect redemption, prior to or subsequent to the time the land was sold for taxes. In other words, this section means that a person may redeem property which has been sold for taxes by paying, in four annual installments, the taxes which are actually due on said property at the time of redemption, without paying any interest or penalty on such taxes.

It will be noted that Section 291, as it originally appeared in the 1935 Revenue Act, and in said section as amended, in order to effect redemption, the party desiring to redeem may pay the amount of "the accrued taxes" in four equal annual installments. The amount required to effect redemption is "the accrued taxes," notwithstanding the fact that the same may be paid in installments.

Section 166 of the 1935 Revenue Act reads in pertinent part as follows:

"Section 166. All taxes becoming delinquent bear interest at the rate of six per cent per annum; * * *"

It is, therefore, my opinion that if the installment payments are allowed to become delinquent, they will bear interest from the date of delinquency at 6% per annum as provided in Section 166, supra.

My answer to your second inquiry is also in the affirmative. Your attention is called to Section 292 of the 1935 Revenue Act, which provides that the State shall have a lien for all unpaid partial payments. This section further provides that upon the failure of the redemptioner to pay one installment, the State Land Commissioner shall at his option declare all of such installments due and payable at once. You state in your request that the State Land Commissioner has not exercised this option in certain instances where several partial payments are delinquent. It is my opinion that when one or more of the partial payments are delinquent and the State Land Commissioner has not exercised his option to declare all payments or installments due and payable at once, you are authorized to accept payment of any or all of these delinquent payments. If the redemptioner wishes to pay one of the delinquent payments without paying all of such delinquent payments, I know of no law that would authorize you, as probate judge, to refuse to accept payment of one of such delinquent payments,

before such time as the State Land Commissioner exercised his option to declare all payments or installments due and payable at once.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 27, 1940.

Hon. Ernest L. McClure,
Clerk, Circuit Court,
Lauderdale County,
Florence, Alabama.

Costs and fees—In misdemeanor cases—

1. When costs amount to more than defendant earns, at statutory rate, during maximum period for which he may be sentenced for costs, execution may issue for that even after sentence is completed, and upon return of execution "no property found" claim for that part of costs becomes proper claim against fine and forfeiture fund.

(a) In such case, in order for claim for all of costs, less these items paid by state, to become proper claim against fine and forfeiture fund, execution must issue and be returned "no property found" before sentence is completed.

2. When costs amount to such that they may be extinguished by labor, at statutory rate, during maximum period for which sentence may be imposed, but not in lesser period of time than required for issuance of execution and return thereon "no property found," in order for claim for all of costs, less these items paid by state, to become proper claim against fine and forfeiture fund, execution must issue and be returned "no property found" before sentence is completed.

3. When costs amount to such that they may be extinguished by labor, at statutory rate, in lesser period of time than required for issuance of execution and return thereon "no property found," claim for that part of costs not paid by state may not become proper claim against fine and forfeiture fund.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Under the ruling of Hon. Thomas E. Knight, Jr., Biennial Report 1930-32, pages 558-9, question number three. I have been collecting all remaining Clerks Cost or fees, from the fine and forfeiture fund, in hard labor cases.

"I have Assistant State Examiners here and they are charging the same back to me. Please let me have an opinion from you as to the legality of same."

In view of the uncertainty in regard to the state of the law on the subject of costs and fees in misdemeanor cases, and the further fact that the opinions of this office on different aspects of that general subject are in conflict, I deem it advisable in answering your inquiry to undertake a somewhat detailed discussion of this general subject, in which I shall attempt to make definite statements of what, in my opinion, is the law in regard to all aspects of this general subject and give the reasons in support of my opinion.

Upon the conviction of a defendant, the "costs of conviction" must be assessed against him, and judgment for the recovery thereof should be entered against him. If judgment for the recovery of such costs is not entered against defendant, he is not liable for the payment thereof, and execution may not issue against him. **Hendon v. Delvichio**, 137 Ala. 594, 34 So. 830.

In a misdemeanor case, where the "costs of conviction" are assessed against the defendant and judgment for the recovery thereof is entered against him, the costs may be met in five different ways:

1. By cash payment. Section 5290 et seq. of the Code of Alabama, 1923.
2. By confession of judgment with good and sufficient sureties. Section 5288 of the Code of Alabama, 1923.
3. By execution on the defendant's property. Sections 5289, 7795, 3735 and 7813 of the Code of Alabama, 1923.
4. By hard labor for the county if not presently paid. Sections 5291 and 3688 of the Code of Alabama, 1923.
5. From the fine and forfeiture fund of the county in certain instances. Section 4039 of the Code of Alabama, 1923, as amended.

The first two of those methods are rights or privileges of the defendant, if he elects to avail himself of the same within the time and in the manner provided by law. The next two are methods of compulsion which, upon the defendant's failure to pay or confess judgment, may be set in motion within the time and in the manner provided by law. The last is a boon or bounty granted by the Legislature to the officers or witnesses who are entitled to costs or fees in the case, when the same have not been paid pursuant to one of the other four methods.

When the "costs of conviction" are met by either of the first two methods hereinabove set out, i. e., by cash payment or the confession of judgment therefor, no difficulty arises as to how and when and from what sources the officers and witnesses receive the costs and fees to which they are respectively entitled. However, when they are not so met, the question of how, when and from what sources the officers and witnesses receive the costs and fees to which they are respectively entitled are questions, the answers to which are not without considerable difficulty, due to the uncertainty of our statutory provisions in regard thereto, and the scarcity of decisions of our appellate courts thereon.

Execution for the costs "or any portion thereof remaining unpaid" may issue according to Section 5289 "as in civil cases"; i. e., within ten days after the rendition of judgment. Section 7795 of the Code of Alabama, 1923. Opinion of the Attorney General to Hon. Howard Kirby, Clerk, Circuit Court, Etowah County, Gadsden, Alabama, under date of July 15, 1935, Biennial Report of Attorney General, 1934-36, p. 230.

The sheriff must execute the writ with diligence, and if practicable, perform the mandate thereof, and must make return of his acts to the clerk as soon as practicable, but in no event later than ninety days from the date of the execution. Section 7813 of the Code of Alabama, 1923. However, he may not make return of such execution "no property found" within less than thirty days from the time it goes into his hands. Section 3735 of the Code of Alabama, 1923; *Trapp v. State*, 122 Ala. 394, 25 So. 194.

When the costs are not presently paid or judgment confessed therefor, the defendant may be sentenced to hard labor for the payment of the same. However, the sentence for costs may not exceed ten months, regardless of the amount of same, and the convict must be allowed a credit of seventy-five cents per day for his labor, on the costs adjudged against him. Sections 5291 and 3688 of the Code of Alabama, 1923.

The two compulsory methods for collection of costs from the defendant, i. e., by execution on the defendant property, or by sentence to hard labor, coexist. In other words, both of such methods for the collection of the costs may be pursued at the same time. Authority for such procedure is found in the opinion in the case of *Clark v. State*, 2 Ala. App. 196, 56 So. 813, from which I quote as follows:

"It is insisted that the court was in error in sentencing the defendant to hard labor for the payment of the sheriff's removal bill. The ground of the objection to that part of the sentence is that the statute (Code 1907, Section 6638, last clause) which authorizes the taxation of that item of cost, provides only for the use of execution against the defendant therefor; and it is insisted that there is no authority of law for including that item in the amount which is made the basis of the court's determination of the period of hard labor required to work out the costs, when the defendant fails to pay them or to confess judgment therefor. In other words, the contention is that the effect of the provision above mentioned is to make execution against the defendant the exclusive method of enforcing the collection of the sheriff's removal fee and expenses. This contention cannot be sustained. Section 6638 of the Code, in which that provision is found, prescribes the fees and allowances to which the sheriff is entitled in criminal cases, and does not

deal with the question of sentencing the defendant to hard labor to pay the costs of the prosecution. Sections 6584 and 7635 of the Code contain the applicable provisions of the law on that subject. By the express term the last mentioned Section, 'If the costs are not presently paid or judgment confessed therefor as provided by law, then the Court may impose additional hard labor for the county for such period not to exceed ten months, as may be sufficient to pay the costs, at the rate,' etc. In such a case as the present one, the amount due to the sheriff for the removal of the defendant is as much a part of 'the costs' as any other item mentioned in Section 6638 of the Code. If the provision for issuance of an execution, contained in the last clause of that section, could be construed as having the effect of making an execution against the defendant the exclusive method of enforcing the collection of that item of costs, it would follow that nothing but an execution could be resorted to for the collection of any of the costs of the prosecution in such a case as the execution there provided for is not merely for the removal fees and expenses, but also 'for the other costs.' Plainly such a construction is not permissible, as the result would be to prevent obedience to the explicit requirements of Sections 6584 and 7635 of the Code." (Sections 6638, 6584 and 7635 of the Code of Alabama, 1907, corresponded respectively to Sections 3741, 3688 and 5291 of the Code of Alabama, 1923)

In the case of *In re: Pierce*, 89 Ala. 177, 8 So. 74 Mr. Chief Justice Stone spoke as follows in construing Section 4504 of the Code of Alabama, 1886, which corresponded substantially to Section 5291 of the Code of Alabama, 1923, *supra*, with the exception of the length of sentence and the rate per day allowed, and contracts for hire of convicts which, of course, have been eliminated in this state:

✓ "Under the statute, if the labor of the convict at the rate per day fixed by the presiding judge pays the whole adjudged costs in less than eight months, whenever the payment is completed, the prisoner is entitled to his discharge. On the other hand, if at the rate fixed it requires more than eight months to make such payment in full, then the term of the imprisonment on that account cannot be extended beyond that term. This is a mere boon extended to convicted offenders, by shortening the term of the alternate mode of collection. It is not a release of the residue of the costs.

"The amount of the costs adjudged in this case was \$172.75, whereas the wages of the prisoner for eight months at thirty cents, would amount to only seventy-two dollars. His right to be discharged from the sentence against him for costs depends, not on the payment of the balance of \$72.00, as claimed by him, but on the payment of the balance of \$172.75, the costs adjudged against him.

"Upon the payment of the costs—the whole adjudged costs, less the part paid in labor—the defendant will be entitled to his discharge, but not till then."

In the case of *Mims, Treasurer v. State ex rel Stallworth, Sheriff*, 130 Ala. 511, 61 So. 811, the court said:

"The fact that the claims have been paid in part by the proceeds of the convict's labor is no bar to the assertion of the claim, in any legal way, to the extent that they remain unpaid."

It results from the language used in these cases that the time actually served by a convict upon a sentence for costs operates as an extinguishment pro tanto, at the statutory rate of 75c a day, of the liability for costs, and that execution will not issue for the costs, or any part of them, paid by actual service. Consequently, when the two compulsory methods of meeting the costs are set in motion at the same time, i. e., execution on the property of the defendant, and a sentence to hard labor for the payment of same, the amount realized from the one method of collection must be deducted from the amount which may be made from the other method of collection, and vice versa. This, for the reason that it is not to be supposed that the Legislature intended that the defendant pay the costs twice.

Advertising now to the fifth method of meeting the costs hereinabove set out, i. e., from the fine and forfeiture fund of the county in certain instances, it should be pointed out that when a defendant is sentenced to hard labor for the payment of costs and is received by the Department of Corrections and Institutions to work out such sentence, the State pays to the proper county authorities the same items of costs set out in Section 3667 of the Code of Alabama, 1923, as provided by Section 3 of Act No. 72, S. 100, approved February 18, 1927 (General Acts, 1927, p. 52), but the total amount of the items so paid may not exceed \$250.00 in any one case. Section 3668 of the Code of Alabama, 1923.

No costs may be paid out of the fine and forfeiture fund, in a case in which the defendant has been convicted, unless the defendant has first been proved insolvent by the return of an execution "no property found." Section 4039 of the Code of Alabama, 1923, as amended; *Mims, Treasurer v. State ex rel Stallworth, Sheriff*, supra.

From the above authorities, in my judgment, the following conclusions may be deducted:

1. A valid judgment for costs, which should be entered against the defendant in all cases in which he is convicted, is a condition precedent to the collection of such costs.
2. An execution for costs may issue only upon a valid judgment therefor which remains unpaid.
3. Execution may issue at any time upon a valid judgment for costs, or any part thereof, which has not been met by a cash payment, by a confession of judgment therefor, or payment by hard labor.
4. The labor of the defendant is an extinguishment pro tanto of the liability for costs, credit for such labor being allowed at the statutory rate of 75c per day.
5. While the defendant may not be sentenced for more than ten months for the payments of costs, his serving such ten months' sentence

only extinguishes that part of his liability for costs which his earnings from such labor during such period amount to, at the statutory rate of 75c per day, and execution may issue for the balance of the costs not so extinguished.

6. No execution may issue for costs, or any part thereof, previously extinguished by labor.

In so far as the question of the collection of costs, or any part of them from the fine and forfeiture fund is concerned all misdemeanor cases may be divided into three classes, viz:

1. Those in which the costs amount to more than the defendant earns, at the statutory rate of 75c per day, during the entire period of ten months, which, as pointed out above, is the maximum sentence which may be imposed upon him for payment of the costs.

2. Those in which the amount of the costs is such that it may be extinguished by the labor of the defendant, at the statutory rate of 75c per day, in a period of time of ten months or less, but which may not be extinguished in a lesser period of time than the time within which an execution for the costs may be issued and returned "no property found."

3. Those in which the amount of the costs is such that it may be extinguished by the labor of the defendant, at the statutory rate of 75c per day, in a lesser period of time than the period of time within which an execution for the costs may be issued and returned "no property found."

We shall now consider each of these classes of case separately as to the question of whether or not claims for the costs, or any part thereof, may become proper claims against the fine and forfeiture fund.

1. In the first class of cases, an execution may be issued for that part of the costs not extinguished by the labor of the defendant, at the statutory rate of 75c per day, even after he has completed the maximum sentence which may be imposed upon him for the payment of costs, i. e., ten months, and upon a return thereon of "no property found," claims for such costs become proper claims against the fine and forfeiture fund. However, in order for claims for all of the costs in such a case, less those items paid by the State, to become proper claims against the fine and forfeiture fund, execution must issue and the returned "no property found" before the defendant has completed the serving of the maximum sentence which may be imposed upon him for the payment of such costs.

2. In those cases where the amount of costs is such that it may be extinguished by the labor of the defendant, at the statutory rate of 75c per day, in ten months or less, but may not be extinguished in a lesser period of time than the time within which an execution for the costs may be issued and returned "no property found," in order for claims for that part of the costs not paid by the State to become proper claims against the fine and forfeiture fund, execution must issue and be returned "no property found" before the defendant has completed the sentence imposed upon him for the payment of the costs.

3 In those cases where the amount of the costs is such that it may be extinguished by the labor of the defendant, at the statutory rate of 75c per day, in a lesser period of time than the period of time within which an execution for the same may be issued and returned "no property found," claims for that part of the costs not paid by the State may not become proper claims against the fine and forfeiture fund.

It has been pointed out above that the clerk should issue execution within ten days after the rendition of the judgment for costs, and that the sheriff may not make return thereon "no property found" less than thirty days after the same is placed in his hands, but he may make such return immediately thereafter. Therefore, if the clerk is diligent in issuing execution for costs, and the sheriff is diligent in making his return thereon, then the only cases in which claims for the costs, or such part thereof as is not paid by the State, where the defendant is sentenced to hard labor for the payment of the same, and is proved insolvent by the return of execution "no property found," may not become proper claims against the fine and forfeiture fund are cases in which the length of time required for the defendant to extinguish his liability for the costs by labor performed, at the statutory rate of 75c per day, is less than thirty days, plus the length of time required for the clerk to issue execution, which should never be more than ten days.

Cf. Opinion to Hon. Chas. E. McCall, Chief Examiner of Public Accounts, Capitol, under date of December 29, 1921, Biennial Report of Attorney General, 1920-22, p. 353, and that part of the opinion to Hon. Chas. W. Lee, State comptroller, Capitol, under date of February 7, 1936, Quarterly Report of Attorney General, Vol. II p. 118, in answer to this question numbered four.

The case of **Isbell National Bank v. Burk**, 25 Ala. App. 414, 147 So. 651, has been considered, but it is not authority, pro or con, on any of the questions here involved, for the reason that in that case it was assumed that execution had been properly issued and returned "no property found."

The following opinions of this office are hereby specifically overruled in so far as they conflict with the holdings of this opinion, as are any other opinions of this office which may have been rendered in conflict herewith: Opinion to Hon. J. H. Hard, State Comptroller, Capitol, under date of November 18, 1933, Biennial Report of Attorney General, 1932-34, p. 436; opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of June 22, 1936, Biennial Report of Attorney General, 1934-36, p. 693; opinion to Hon. W. H. Quillin, Judge, Law and Equity Court, Franklin County, Russellville, Alabama, under date of September 9, 1938, Biennial Report of Attorney General, 1936-38, p. 781; opinion to Hon. O. L. Andrews, Clerk, Tenth Judicial Circuit, Birmingham, Alabama, under date of June 26, 1936, Quarterly Report of Attorney General, Vol. III, p. 205; opinion to Hon. B. P. Singleton, Chief Examiner of Accounts, Capitol, under date of May 22, 1939, Quarterly Report of Attorney General, Vol. XV, p. 206.

Yours very truly,

THOMAS S. LAWSON,

Attorney General

January 27, 1940.

Hon. Frank N. Julian,
Superintendent of Insurance,
Department of Commerce,
Capitol.

Taxation—Insurance—Claims against the State. A tax debtor can never be allowed to set off against his taxes, a claim against the State.

No authority of law for refund of taxes on insurance premiums erroneously paid except by timely petition to State Board of Adjustment.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of December 4, 1939, in which you request my opinion as follows:

"I am enclosing you herewith copy of letter received from the Employers Insurance Company relative to a refund of premium taxes. The letter is self-explanatory.

"For your ready information I am enclosing copy of the Attorney General's opinion dated April 22, 1939.

"For your information we would advise you that prior to the opinion of April 22, 1939 the Bureau of Insurance had not allowed dividends paid to be deducted as a 'returned premium' for the reason that the original Attorney General's opinion by Attorney General R. C. Brickell referred specifically to life insurance dividends. Later opinions held to the question of life insurance. Hence the Bureau of Insurance did not allow dividends paid by fire and casualty insurance companies as a deductible item in the payment of premium taxes. We will thank you to advise us whether or not: Should the Employers Insurance Company of Alabama be allowed credit for the sum of \$1,006.65 as a refund on the premium taxes to be paid as of January 1st?"

In answer to your inquiry I am of the opinion that an Insurance Company cannot be allowed a set off against their taxes a claim against the State for over-payment of taxes for previous years.

In the case of **Shelton, Tax Collector, et al. vs. Blount County**, 202 Ala. 620, 81 So. 502, the Supreme Court adopted the following language from the case of **City of New Orleans v. Davidson**, 30 La. Ann. 541, 31 Am. Rep. 228.

"Considerations of public policy require that a tax of one year should not be compensated by an overpayment of a previous year. The

taxes of each year are laid to meet the exigencies of that year. If they could be reduced by a deduction of such sums as had been already wrongfully demanded and paid, the revenues requisite for the support of government might be diminished so largely as to occasion public detriment.'"

This office on April 22, 1939, in an opinion to Hon. Frank N. Julian, Superintendent of Insurance, held: "The correspondence attached to your inquiry makes application to your department to deduct the overpayments of former years from the payments due the current year. I am aware of no authority which would allow this deduction. Taxes due for one year cannot be satisfied by an overpayment of taxes made the previous years. **Shelton, Tax Collector, v. Blount County**, 81 So. 562, 202 Ala. 620."

I know of no law authorizing a refund of such a tax by the Insurance Department. The tax was paid to the Superintendent of Insurance. Act No. 432, H. B. 888, approved July 17, 1931, provides: "That where any taxpayer in the payment of taxes which are paid directly to the State Tax Commission" through mistake etc. You will note that the Act only applies to taxes paid directly to the State Tax Commission. Therefore, it cannot apply to taxes paid other State Agencies.

Sections 296-303 of Act No. 194 H. B. 324, approved July 10, 1935, General Acts 1935, p. 379, provide the method by which refunds of property taxes are allowed.

Section 366 of H. B. 324, *supra*, applies to refunds of licenses paid through a mistake or error on the part of the Probate Judge.

In the case of **Lee, State Comptroller vs. Cunningham**, 234 Ala. 639, 176 So. 477, Justice Brown speaking for the Court uses the following language:

"It is well settled that the right to reclaim money voluntarily paid to the state or the counties thereof, as taxes, is a creature of legislative grace which the Legislature may restrict or limit by future legislation. **First National Bank of Scottsboro v. Jackson County**, 227 Ala. 448, 150 So. 690."

I find no provision in our statutes permitting such a refund, except by authority of Act No. 546 H. B. 871 approved September 14, 1935, General Acts 1935, p. 1164, as amended by Act No. 173 H. B. 266, Approved March 1, 1937, General and Local Acts 1936-1937 p. 205. This Act creates the State Board of Adjustment and gives this body jurisdiction to determine all claims for money overpaid on obligations of the State, and all claims for money voluntarily paid to the State where no legal liability existed to make such payment. This Board does not have jurisdiction to determine claims of which the courts of the State have or had jurisdiction. All claims must be presented to the Board within one year after the cause of action accrues, and if not presented within the time prescribed the Board is prohibited from hearing and considering them.

The only other method of securing the refund is by a relief bill passed by the Legislature. **Biennial Report of Attorney General**, 1928-30, p. 685.

Trusting that this answers your inquiry, I am

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 27, 1940.

Hon. J. Milton Schnell, Chairman,
Mobile County Board of Registrars,
Mobile, Alabama.

Electors—Voters—

A party would not be disqualified from voting who had been convicted of crime which would disqualify him while his case is pending in the appellate courts as this disqualification does not attach until the case is finally disposed of and the judgment of the court of last resort has affirmed the conviction had in the trial court.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of January 20, 1940, in which you request my opinion as follows:

“Will you kindly give me your opinion on the following:

“John Doe has been convicted in the United States District Court, here in Mobile, in a case involving a test of that part of the U. S. Constitution in connection with the guarantees of free speech and free press, and sentenced to better than a year in a Federal Penitentiary.

“On the strength of the above, his name was removed by the Board of Registrars from the list of qualified electors of Mobile County, the place of his legal residence.

“An appeal from his conviction was taken to a higher Federal Court and the findings of the lower Court reversed and remanded.

“What is the status of his citizenship rights at the time of this later ruling? Should any action be taken reinstating him as a qualified elector at this time, presuming they may or may not be further appeals taken?”

In answer to your inquiry I call your attention to an opinion of this office dated February 28, 1936, addressed to Hon. Geo. L. McBride, Chairman, Colbert County Board of Registrars, Tuscombua, Alabama, which holds, "A party would not be disqualified from voting, who had been convicted of crime which would disqualify him, while his case is pending in the Supreme Court, as this qualification does not attach until the case is finally disposed of." Quarterly Report of Attorney General, Vol. II, page 235.

Section 182 of the Constitution of Alabama, 1901, provides as follows:

"Section 182. The following persons shall be disqualified both from registering, and from voting namely:

"All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

Section 364 of the Code of Alabama, 1923, provides:

"Section 364. Disqualifications of elector to vote.—The following persons shall be disqualified both from registering and voting: All idiots and insane persons; those who were by reason of conviction of crime disqualified from voting at the time of the ratification of the constitution on November 28, 1901; those who have been since November 28, 1901, or who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary or of any infamous crime or crimes involving moral turpitude; also any person who has been since November 29, 1901, or who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote, or the vote of another; or of buying or offering to buy the vote of another, or of making or offering to make false return in any election by the people, or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or register to secure the registration of any person as an elector."

The word "conviction" in a strict legal sense, or when used in its more restricted and technical significance, has been defined as denoting the final

judgment of the court and as importing the final consummation of the prosecution, from the complaint to the judgment of the court by sentence. 18 C. J. S. 97.

"When conviction is made the ground of some disability or special penalty, a final adjudication by judgment is essential. In such cases, 'when the law speaks of conviction, it means a judgment, and not merely a verdict, which in common parlance is called a conviction.'" 13 C. J. 907.

If an appeal be prosecuted, the effect of the appeal is to suspend and hold in abeyance the enforcement and legal consequences of the conviction until the judgment of the court of last resort has affirmed the conviction had in the trial court. *Arcia v. State*, 26 Tex. A. 193, 204, 9 S. W. 685, 192 N. Y. 443, 85 N. E. 672, 18 L. R. A. (N. S.) 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100; *State v. Houston*, 103 N. C. 383, 9 S. E. 699; *Donnell v. Board of Registration of Medicine*, 128 Me. 523, 149 A. 153.

In the case of *Harmon v. Bowers*, 78 Kan. 135, 96 P. 51, 17 L. R. A. (N. S.) 502, 16 Ann. Cas. 121, the Supreme Court of Kansas held "that under the statutes of Kansas the defendant Harmon's civil rights were not suspended until he actually began his term of sentence in the penitentiary."

The Supreme Court of the State of Florida rendered an advisory opinion upon the request of the Governor which held as follows:

"While an officer may be suspended from office 'for the commission of any felony' the office is not 'deemed vacant' under section 298 of the General Statutes, except upon 'conviction,' and a conviction is not operative while a supersedeas is effective."

In view of the foregoing decisions I adhere to the opinion of this office heretofore rendered that where a defendant is convicted of a felony in this State, his disqualification as an elector does not attach immediately, but this disqualification is suspended by his appeal.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1940.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Contractors—Licenses—

Contractor holding licenses for contracts not exceeding \$10,000.00 and later accepting a contract amounting to \$56,000.00, held liable for difference in amount of license for \$10,000.00 and amount of license for contracts in excess of \$50,000.00 and not exceeding \$100,000.00, together with whatever fees and penalties that may have attached.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 8, 1939, in which you request my opinion as follows:

"I respectfully request your opinion as to the correct procedure in issuing a license to a contractor under the following circumstances:

"A contractor, whose principal place of business is located within Lee County, purchases a license based on the gross amount of all orders or contracts accepted not exceeding \$10,000; which said license costs him \$15.50—\$10.00 for the State and \$5.00 for the County. Later, he accepts a contract, amounting to \$56,000, in Montgomery; and is cited by the license inspector to procure the proper license. He then returns to Lee County to obtain such license and insists that he is due only the difference between the \$15.50 originally paid, covering a contract in the maximum amount of \$10,000 and the amount of \$75.50, which is the amount to cover contracts exceeding \$50,000 and not exceeding \$100,000.

"Under Schedule 42, Alabama Revenue Laws as compiled by Harry Simon, which sets out the amount of license due by contractors and states:

"—when such contractor shall have obtained a license for any year for which he has paid a license tax of less than the maximum above prescribed he shall not accept any contract or contracts during such year, the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate amount of such contract or contracts as prescribed above; and unless he pays such additional sum he shall be deemed to be acting without a license—."

"it would appear that 'such additional sum as will make the total license paid by him for that year sufficient to cover the aggregate amount of such contracts' tends to convey the intent of the Legislature to the effect that he could pay the difference between the two licenses. I do not care, however, to take the responsibility of interpreting the Act and would appreciate your opinion thereon.

"Please inform me as to whether the contractor can pay the difference between the two licenses; or if he will be required to pay the total amount of the license in the bracket in which his contract falls. As the citation has already been served and the contractor is eager to proceed with his work, I shall appreciate it very much if you will give this your immediate attention."

In reply, I wish to call your attention to the following language found in Schedule 42 of Section 348 of the Revenue Act of 1935, (Act No. 194, H. B. 324, General Acts, 1935, p. 455) as follows:

"And when such contractor shall have obtained a license for any year for which he has paid a license tax of less than the maximum above prescribed, he shall not accept any contract or contracts during such year, the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate of such contract or contracts as prescribed above; and unless he pays such additional sum he shall be deemed to be acting without a license * * *."

In my judgment, the contractor referred to by you should pay the difference between the amounts set out above for the license bought and the licensee by law required.

In my judgment, the language of the above quoted statute is clear and will not admit of construction to determine the legislative intent. **State v. H. G. Fain Service Station**, 23 Ala. App. 239, 124 So. 119. Premises considered, I wish to advise that in my opinion the contractor named by you should pay the difference between the cost of the license for contracts exceeding \$50,000.00 and not in excess of \$100,000.00, which difference is over and above the amount paid for the license now held by the said contractor. In my judgment, the contention advanced by the contractor named by you is correct concerning amount of license, but I call your attention to the penalties and citation fees which must be paid in addition.

I specifically refer you to Quarterly Report of the Attorney General, Vol. III, page 39, in which opinion it was held that a contractor who accepts a contract without having first obtained the license prescribed by Schedule 42 of the General Acts of 1935, page 455, is liable for a penalty of 15% and 6% interest imposed by Section 353 of the General Acts of 1935, page 559.

I wish also to call your attention to an opinion of the Attorney General found in Quarterly Report of the Attorney General, Vol. XV, page 60, which holds that the license inspector of the county in which the citation is issued to the licensee is entitled to citation fees provided for license inspectors, but the penalty is to be paid to the license inspector of the county in which the licensee has his principal place of business.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 27, 1940.

Hon. Thomas A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Filing Tax—Deeds—

Quitclaim deed executed for a nominal consideration for the purpose of perfecting the title to real estate, is exempt under Schedule 46 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated January 11, 1940, which follows:

"A certain Will has been probated in this Court and among other bequests of real estate made therein, one of the heirs was to and has received real estate described in the Will as 'the forty acres of land lying in the Southeast part of Atmore.'

"I now have a quitclaim deed presented to me for record, executed by the remaining devisees of said Will, conveying their interest to Nell C. Jones in the above forty acres of land, described in the deed as follows:

" 'The NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 32. Tp. 1, R. 6.'

"The recital in the deed is as follows:

" 'The foregoing property is the same as that devised to the grantee, Nellie Jones, (who is the same person as Nell C. Jones, the grantee herein), under the last Will and Testament of John D. Curtis, Deceased, which was probated in the Probate Court of Escambia County, Alabama, on August 1, 1939, and is of record in said Court, particularly under Item 3 of said Will.

" 'Without impairing the operation of said Will or the title vested in the grantee thereunder, the grantors have executed and delivered this deed to the grantee to remove any future possibility of confusion with respect to the description of said property as devised to the grantee and to place upon the public records an exact description of the real estate to devised.'

"Under these statements of facts, please give me your official opinion as to whether or not this instrument is subject to the filing tax on deeds."

It is my opinion, based upon the facts set out in your letter, that the deed offered for record is not subject to the record filing tax levied by Schedule 46 of Section 348 of the 1935 Revenue Act (General Acts, 1935, page 356), which, as here pertinent, provides:

"Schedule 46. Deeds, bills of sales, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, **deed or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate**, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit:"

It will be noted that instruments and deeds executed for a nominal consideration for the purpose of perfecting the title to real estate are exempt from the payment of the filing tax imposed for Schedule 46, supra.

I call your attention to the case of **Hawkins, Probate Judge v. Pure Oil Company**, 232 Ala. 660, 169 So. 307. In this case, the Supreme Court, in discussing Section 21½ of the 1927 Revenue Act, which section was brought forward in the 1935 Revenue Act, as Schedule 46, said:

"It is a matter of general knowledge that in abstracting titles to property, and in making sales, and settling estates numerous defects appear which should be corrected on the record, and the owner, though having possession and title, is required to perfect the record title, and deeds are oftentimes required for this purpose. They are based upon a mere nominal consideration, and usually serve to correct a technical error or defect in the title, or perhaps some matter of description. We attempt no exact statement of the extent or limitations of this exception, but merely observe that its general purpose had reference to some such situation as thus outlined."

Therefore, applying the above rule to facts set forth in your inquiry, it is my opinion that Nell C. Jones did not acquire title to the real estate in question by virtue of the quitclaim deed offered for record, but said deed was executed solely for the purpose of perfecting the title to the real estate, and comes within the exemption granted by Schedule 46, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 29, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

State Board of Veterinary Medical Examiners—

Business of the State Board of Veterinary Medical Examiners held to be only such matters as are found in the duties and functions of said Board.

Funds of the said Board held to be expendable only for the **business** of said Board.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 7, 1939, in which you request my opinion as follows:

"Please refer to Act No. 82, House Bill 72, 1915 Session, and particularly to Sections 7 and 10 of this Act, and advise me in answer to the following:

"1. Can the State Board of Veterinary and Medical Examiners and/or Secretary-Treasurer legally expend any of its funds for the purchase of equipment and improvements for the Veterinary School at Auburn, Alabama?

"2. Can the State Board of Veterinary and Medical Examiners and/or Secretary-Treasurer legally expend any of its funds for the purpose of purchasing a memorial for a deceased former member?

"3. Can this Veterinary Board and/or the Secretary-Treasurer legally accept notes in lieu of cash and allow graduates of the School of Veterinary Medicine at Auburn to take the Board's examination?

"4. If your answer to any of the above three questions should be in the negative, would not the Secretary-Treasurer be liable, personally and on his official bond?"

In reply, I wish to call your attention to the fact that Act No. 82, H. B. 72, approved March 17, 1915, General Acts, 1915, page 125, was carried forward in the Code of 1923 as Sections 1249-1265. I wish particularly to refer you to Section 1265 of the Code of 1923, which provides as follows:

"1265. Expenses of board.—The members of the state board of veterinary medical examiners may receive five dollars a day and actual expenses while attending meetings or other official duties. The secretary-treasurer shall receive a salary of forty dollars a year and actual expenses and shall be required to make semi-annual reports in detail to the examining board. The legal expenses of the board shall be paid by the board from the license and permit fees. In no case shall the state of Alabama be called upon to pay the expenses of the state board of veterinary medical examiners, or any debts contracted by the said board."

In my judgment, the funds here concerned must be used by said Board for the **business** of said Board. This provision seems to be explicit as set out in Section 1252 of the Code of 1923, which provides as follows:

"1252. Meetings of board; notice of.—The state board of veterinary medical examiners meet within thirty days after their appointment, organize and adopt such rules and regulations as they may deem necessary to carry on the business of the board, conduct examinations, issue permits and licenses. This board shall meet at least twice a year and the time and place and objects of each meeting shall be specifically stated, and each member shall be notified in writing ten days prior to the time of each meeting. Public notice of the time and place shall be given in not less than three daily papers of Alabama."

In my judgment, the answer to your request must be governed by a determination of what constitutes the **business** of the State Board of Veterinary Medical Examiners. This question necessarily requires an investigation of the legislative intent. The applicable law provides in part, as follows:

"Section 1250. State board of veterinary medical examiners; how constituted.—A state board of veterinary medical examiners is established to consist of five members who shall be in good standing and members of the state veterinary medical association of Alabama and graduates of a legally chartered and accredited veterinary medical college and each member shall hold his membership until his successor is appointed and duly qualified. The members of the state board of veterinary medical examiners shall be appointed by the governor of Alabama, and vacancies shall be filled by him.

"Section 1251. Terms of office of board; officers, seal of board.—The members of the state board of veterinary medical examiners shall be appointed by the governor for a period of five years and shall serve until their successors are appointed and qualified. This board shall elect from its members, a president, and a secretary-treasurer. This board shall have an official seal, and shall have power to call witnesses and take testimony bearing on the records of applicants for permits or for licenses to practice veterinary medicine and surgery in Alabama."

You will note that the above quoted sections from Act No. 79, General Acts 1915, page 125, as brought forward in the Code of 1923, authorize the creation of the Board of Veterinary Medical Examiners and authorize the Board to "adopt such rules and regulations as they may deem necessary to carry on the business of the board, conduct examinations, issue permits and licenses". The Board is required to meet at least twice a year, public and private notice to members being required.

Section 1258 of the Code provides:

"Section 1258. The State board of veterinary medical examiners shall hold at least two (2) examinations each year and as many more as they may deem necessary, at such place and time as they may legally call and advertise. At least three of the members must be present at the time said examinations are conducted. Said examinations shall be theoretical and practical and may be written, oral or both. Said examinations shall include the following subjects: Veterinary anatomy, surgery, veterinary medicine, obstetrics, pathology and bacteriology, therapeutics and pharmacy, veterinary physiology, animal husbandry and dairying, meat inspection, milk inspection, chemistry, veterinary sanitation."

A reading of the above quoted excerpts from the named act of 1915 gives considerable insight into the **business** of the said Board. Numerous functions and duties are outlined, which, in the ordinary course of operation, would necessitate expenditure of money. I find no serious ambiguities and no apparent conflicts in the language of the statute. In my judgment, it is evident that the conduction of the examinations, consideration and investigation of applications and in general the operation of the ordinary functions set out in the considered act constitute integral and necessary parts of the **business** of the said Board. In my judgment, the language of the quoted sections of the named act is too clear to admit construction. **Ramsden v. Dixie Coach Lines**, 190 So. 92, (Advance Sheets).

I can see no reason to doubt that matters of the nature here outlined might be considered the **business** of the Board and that by proper rule or resolution the Board has full authority to adopt such. But your specific questions carry the investigation into the question of whether the acts which are the subject of your inquiry are closely enough related to the named acts, which by law are made **business** of the Board, to become ipso facto **business** of the Board. May the Board by its authority to make rules and regulations for the conduct of its **business** adopt **business** in nature foreign or incongruous to that set out by its creator, the Legislature, for the Board to perform? The principal **business** of the Board here considered is set out by law, and in my judgment a thing incongruous to or entirely foreign to the purposes and principles upon which the Board is established cannot be said to lie within the legislative intent and become "business of the Board".

You will note that no broad authority to expend its money as its will may direct exists in the State Board of Veterinary Examiners. In my judgment, money spent for the **business** of the Board then must find authority [in the main functions and duties of the Board.] Nowhere in the act do I find authorization for expenditures kindred to those named by the second question of your request. In my judgment, therefore, your second question must necessarily be answered in the negative as the expenditure named cannot constitute a part of the functions and duties named for the Board, and therefore cannot be **business** of the Board.

In reply to your question numbered three, I wish to advise that in my judgment there is no authority to accept notes in lieu of cash as payment of the fees required for examination by such Board.

I call your attention to Section 1256 of the Code of 1923, where Section 10 of the Act of 1915, named by you, is codified as follows:

"1256. Examination of graduates from veterinary college; permits, when issued.—Every graduate of a legally chartered veterinary college which requires an attendance of three years of not less than eight months each to obtain a degree in veterinary medicine and surgery shall be entitled to an examination by the board upon payment in advance of a fee of fifteen dollars. Such graduates may apply for, and receive, special and limited permits to practice with an office at a specified place until the state board of veterinary medical examiners shall meet, give examinations, and pass on said examinations."

I call your particular attention to the requirement of law that the fee here considered be paid in advance. A promissory note cannot, in my opinion, be considered as such payment as is required by the above quoted provisions of law. A promissory note at best is a promise to pay at a future date. The statute here considered is clear that payment must be made in advance of the taking of the examination by the applicant.

It is my judgment that the principle of law applicable to the payment of the fees here considered is the same as that applicable to payment of taxes.

In the case of **Wadsworth v. State**, 225 Ala. 118, 142 So. 529, it was held that the obligation to pay taxes must be discharged by payment in money, and that payment by check is not payment until such check is actually paid.

I therefore advise you that notes cannot be accepted as payment "in advance" as required by the statute here considered.

I have reserved answer to your first question until the last, since I wish to qualify my reply to this question. It is my judgment that this question must be answered conditionally. This office has heretofore held in an opinion addressed to Hon. R. A. Polglaze, Secretary, Board of Registration for Professional Engineers and Land Surveyors, 117 Webb Crawford Building, Birmingham, Alabama, under date of November 22, 1939, a copy of which I enclose, that expenditures in a case similar to the case concerned in your inquiry, are authorized.

In my judgment, the expenditures concerned in your first question are authorized if the Board of Veterinary Medical Examiners, in the course of conducting examinations or other business of the said Board finds that such equipment, as contributed to the Veterinary School at Auburn, may be advantageously placed at Auburn for the use of the said Board in the conduct of any of its "business", even though such equipment be further used in the Veterinary School at Auburn. The discretion of the Board in the conduct of its official business is sufficiently broad to permit its examinations to be conducted as the Board may direct, and it is therefore conceivable, if not altogether probable that equipment of the nature here concerned would be necessary to the proper conduct of the business of the said Board. I therefore advise you that in my judgment your first inquiry, subject to the qualifications herein set out, should be answered in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 30, 1940.

Hon. John D. Petree,
Director of Industrial Relations,
Montgomery, Alabama.

Child Labor—

Employment of a child under sixteen years of age, attended by a parent or with parental consent, on a radio program broadcast for entertainment at irregular intervals where the child is not employed under contract and neither child nor parent receives remuneration for the performance, held not violative of subsection 15 of Section 300, Code of Alabama, 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 19, 1939, in which you request my opinion as follows:

"I am informed by the Chief of the Division of Labor of the Department of Industrial Relations that a problem has recently arisen in connection with the enforcement of the Child Labor Laws of the State of Alabama. It is in regard to the application of Section 3500 Code of Alabama of 1923, subsection 15, which is as follows:

"3500. Places where child under sixteen forbidden to work.—* * * (15) nor shall any child under the age of sixteen years be employed upon the stage of any theatre or concert hall, or in connection with any theatrical performance or other exhibition or show, except that children fourteen years of age may be employed as ushers in theatres or concert halls in accordance with the provisions of section 3495, 3502 and 3503 of this chapter;"

"The particular question involved is whether the provisions of this subsection quoted above are applicable to such employees of radio broadcasting stations.

"I shall appreciate your giving consideration to this question and advising me of your opinion at your convenience."

I also have your letter of January 11, 1940, setting forth the following hypothetical case which you state to be typical of the matter inquired about in your request for opinion of December 19, 1939:

"A child under sixteen years of age, who is attended by a parent or receives parental consent, appears on a radio program broadcast for entertainment. Such broadcasts are not regularly reoccurring, there may only be one, or it is possible that the child may render two, three, or four over a period of a month. Such broadcasts do not arise out of a

contractual relationship nor does the child receive remuneration for the performance of such services. The program is not sponsored by a commercial advertiser but is entirely under the supervision and control of the program director of the particular radio broadcasting station involved.

"Prior to making this request for a formal opinion from your office, Attorney General opinions dated June 6, 1924, October 21, 1930, and February 7, 1939 were considered. It is desired that you furnish us with your opinion as to whether the provisions of the Alabama Law referred to herein would affect or prohibit such a performance by a child under sixteen years of age as outlined in the preceding paragraph."

Section 3500, subsection 15, Code of Alabama, 1923, which you quote in your inquiry, has been under consideration by this office on several previous occasions, and it has been uniformly determined that the statute does not regard the mere fact of the child taking part in a play upon the stage of a theater, or of being employed in a concert hall or in connection with any theatrical performance or other exhibition or show as necessarily injurious, in and of itself to the child. This conclusion has been predicated upon the premise that in subdivision 15 of Section 3500 the inhibition concerns only the "employment" while in other subsections there are detailed certain activities for the performance of which no child can be employed, nor at which any child can be permitted or suffered to work.

In other words, this office has expressed the opinion that the purpose of subsection 15 of Section 3500 is to prevent the child from being exploited for gain in connection with such entertainment enterprises in such a manner as would be injurious to either the health or to the mental or moral development of the child. See Biennial Report of Attorney General, 1922-24, page 367; Biennial Report of Attorney General, 1930-32, page 8. The conclusions reached in these opinions are here also adhered to.

From an examination of the facts set forth in your inquiry, it appears that the children in question are permitted to appear on the radio program under the supervision of their parents, or with parental consent. It does not appear that the children are under such contractual obligations as to prevent the exercise of parental judgment as to whether or not an appearance on the radio broadcast on a particular occasion would result in dangerous or injurious affects upon the child so appearing. In short, in my judgment, it clearly appears that the arrangement detailed in your inquiry indicates that the children are permitted to appear on the radio stations only in such manner and under such conditions as are desired by the children and the parents or guardians, and to such extent as will insure the safeguard of the health and morals of the children.

As stated, it has been heretofore determined that where the children are properly cared for and are free to engage in the act or not as the parent or guardian desires it; where the child receives no direct or indirect compensation other than the educational advantages of same; and where there are no contractual duties to be performed and the child is in no way exploited for gain, there is no objection against the child appearing in the exhibition, show, or other performance. You are, therefore, advised that under the facts

stated by you, a child may be permitted to appear on a radio broadcast without offending subsection 15 of Section 3500, Code of Alabama, 1923.

I have not attempted to consider every situation which may arise in connection with the appearance of children on radio broadcasts, for no doubt there are circumstances which may occur from time to time which in their very nature would be violative of subsection 15 of Section 3500; conclusions hereinabove reached are limited strictly to the facts set forth for consideration. Neither have I considered Section 3495 for the reason that this section was not presented for consideration by your inquiry.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 30, 1940.

Hon. Rufus H. Bethea, Chairman,
Jefferson County Board of Registrars,
102 Court House,
Birmingham, Alabama.

Elections—An alien who has become a naturalized citizen is due all poll tax from the time he becomes an inhabitant of this State and is over twenty-one years of age and under forty-five years of age, regardless of when he became naturalized.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of January 17, 1940, in which you request my opinion as follows:

"Under date of December 2, 1935, the Attorney General ruled in an opinion to this Board:

"Elections—An alien who has become a naturalized citizen is due all poll tax from the time he becomes an inhabitant of this State and is over twenty-one years of age and under forty-five years of age, regardless of when he became naturalized."

"This overruled an opinion to this Board of February 19, 1932, and one to the Probate Judge of Cullman County of March 9, 1929, holding that poll tax in case of naturalized citizens accrued only from time of naturalization.

"Several of the Judges of this County and at least twenty-five other persons have suggested that I request another opinion as to poll tax due by naturalized citizens.

"This Board will appreciate a reply by January 22, the opening day of our next registration period."

In answer to your inquiry, I call your attention to an opinion heretofore rendered by this office dated December 2, 1935, addressed to Hon. S. W. Hawkins, Chairman, Board of Registrars, Jefferson County,—Biennial Report of Attorney General, 1934-36, page 408. I quote and adopt part of the language therein used, "I am of the opinion that a poll tax is due by each inhabitant of this State over the age of twenty-one years and under forty-five years, not exempt by law. Section 3029, Code of Alabama, 1923, Biennial Report of Attorney General 1928-30, page 723."

Section 194 of the Constitution of Alabama, 1901, reads as follows:

"The poll tax mentioned in this article shall be one dollar and fifty cents upon **each male inhabitant of the State, over the age of twenty-one years, and under the age of forty-five years**, who would not now be exempt by law; but the legislature is authorized to increase the maximum age fixed in this section to not more than sixty years. Such poll tax shall become due and payable on the first day of October in each year, and become delinquent on the first day of the next succeeding February, but no legal process, nor any fee or commission shall be allowed for the collection of poll tax collections separate from other collections." (Emphasis supplied)

The General Acts of Alabama, 1935, page 349, Section 203, provides as follows:

"Section 203. There may be collected as hereinafter provided, from **every person in this State over the age of twenty-one years and under the age of forty-five years**, not exempt by law, the sum of one dollar and fifty cents as poll tax, which shall be applied exclusively in aid of the public school fund in the counties in which it is levied and collected." (Emphasis supplied)

It is to be noted that the Constitution provides the payment of the poll tax upon each male **inhabitant** of the State and that the General Acts provide that the tax be collected from **each person in the State** over twenty-one years and under the age of forty-five clearly indicating that being an **inhabitant of the State or residing in the State** governs and as stated in the opinion heretofore rendered by this office, "The fact of being a foreigner, not naturalized, and, therefore, not qualified to vote, does not exempt him from the payment of poll tax. Being due a poll tax is dependent upon age and residence and the further fact that one is not exempt from payment of poll tax. The fact that one is an unnaturalized foreigner does not constitute an exemption from payment of poll tax."

The poll tax collected is paid back to the County and is used exclusively by the county for the support of its schools. According to the records in the office of the State Comptroller, Jefferson County received \$31,878.00 collected

between October 1, 1938, and February 1, 1939. Certainly it would not be considered equitable to permit an alien to live within the confines of our State during the ages of twenty-one to forty-five, enjoy all of the rights and privileges granted under our laws and then permit the alien to become naturalized after forty-five and exempt him from the payment of poll tax.

Under the express terms of the Constitution of 1901, Article 8, Sections 178 and 194, to qualify as a voter a man over twenty-one years of age and under forty-five, who is not exempt, must pay on or before February 1st preceding the election at which he offers to vote all poll tax due by him from 1901 and subsequent years. *Frost v. State*, 153 Ala. 654, 45 So. 203.

The opinion of this office heretofore rendered further holds:

"The payment of all poll tax due is one of the conditions upon which a person is allowed to vote in Alabama.—Section 178, Constitution of Alabama.

"It, therefore, follows that the person named by you, unless exempt for some other reason than as stated by you, must pay poll tax for each year he has been a resident of the State of Alabama since he was twenty-one years of age. To determine this, he must count from the first day of October after becoming twenty-one years of age. If he became twenty-one years of age on the first day of October, his first poll tax became due that day. If he became twenty-one years old on October 2nd, his first poll tax became due October 1st of succeeding year.—*Shepherd v. Sartain*, 185 Ala. 439 30th head note."

I am, therefore, of the opinion that the opinion rendered by this office as of December 2, 1935, is correct.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 30, 1940.

Hon. Harry H. Jones, Secretary,
Board for Registration of Architects,
315 Shepherd Building,
Montgomery, Alabama.

Registration of Architects—

A person making application to the Board of Registration of Architects, who filed his application under a then existing statute but whose application was not acted upon until after an amendment to the statute by the Legislature was passed, would be subject to the conditions set out in said amendment.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 28, 1939, in which you request my opinion as follows:

"Please allow me to impose upon your valuable time for some assistance in the interpretation of part of Section 8 as amended March 16, 1939, of the Act creating the Alabama State Board for Registration of Architects.

"The question in mind is as follows: All applicants for registration whose applications preceded the amendment of the Registration Act, but whose application could not, for reason of not being in proper order, be acted upon by the Board at its regular meeting which occurred after the passage and approval of the said amendment of the Act.

"The old act, part of Section 8, which reads as follows:

"'Graduation after a course of not less than four years in Architecture from a school or college of Architecture approved by the Board as of satisfactory standing and **one year** of Architectural engagement in Architectural work.'

"The amended part of Section 8 reads as follows:

"'Graduation after a course of not less than four years in Architecture from a school or college of Architecture approved by the Board as of satisfactory standing and an additional three years Architectural engagement in Architectural work in the office or offices of a reputable Architect.'

"We will appreciate your interpretation where an applicant submitted his application to the Board's office preceding the amendment of the Registration Act, but could not be acted upon by the Board at its next regular meeting which occurred after the passage of the said amendment to the Act, and further shall the Board except the **one year's** experience for these applicants in addition to their graduation, or shall they be guided by the required three years as called for in the amended section of the act?"

Both the original act creating the State Board for Registration of Architects and the act approved March 16, 1939, which amends the original act, are purely statutory and are subject to change at any time the Legislature may see fit, and I am of the opinion that neither grants or gives such a vested right as would not be subject to change by the Legislature at any future date either by amendment to the original act or by an altogether separate enactment. Therefore, I am of the opinion that whenever a person makes application for registration as an architect, he must be able to meet all the requirements of the law and of the Board, not at the time he makes his application but he must meet such requirements as are in force at the time the registration is perfected. In order for a right to be vested, it must

be complete, not resting on some contingency. **Wayne County v. Hickman**, 199 S. W. 990; **Blake v. State, ex rel. Goin et al.**, 178 Ala. 407, 59 So. 623. The cases here cited, of course, are not on all-fours with the facts of the present question, but they do involve the same fundamental principles. Therefore, if the applicant in the present case had not, for any reason, obtained his registration at the time the amendment, *supra*, was passed, he did not by a mere application to the Board for registration acquire such a right as could not be affected by a subsequent enactment changing the requirements of registration.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 30, 1940.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Costs and fees—

1. Fines and forfeitures for violations of Act No. 484, S. 351, approved September 19, 1939, which includes driving motor truck at greater speed than forty miles per hour outside of an incorporated town, should be remitted to the State Treasury for credit to the State Highway Department.

2. Act No. 156, S. 143, approved March 16, 1939 (General Acts, 1939, p. 229, Pamphlet), applies to violations of said Act No. 484, S. 351, approved September 19, 1939.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of October 7, 1939, requesting my opinion as follows:

"A defendant pleads guilty in the Law & Equity Court of Franklin County to a violation of driving a motor truck upon a highway in violation of Act No. 484 (Senate Bill 351) approved by the Governor Sept. 19, 1939, by driving said motor truck at a greater speed than forty miles per hour outside of an incorporated town and the court fixed his fine at \$100.00. Should this fine be paid to the fine and forfeiture fund of the county, to the highway department or to the highway patrol fund? To whom should the fine be paid when it is disbursed? Should a trial tax and solicitor's fee be collected from the defendant? I also have in mind Act No. 156 approved by the Governor March 16, 1939. Please let me have your opinion."

In your request you ask, in substance, two questions, viz: 1. To whom should the fine here considered be remitted? 2. Do the provisions of Act No. 156, S. 143, approved March 16, 1939 (General Acts, 1939, page 229, Pamphlet) apply to such a violation of the act here considered?

In reply to your first question, I wish to advise that, in my opinion, fines and forfeitures for such a violation of Act No. 58, H. 112, approved October 6, 1932 (General Acts, 1932, page 68), as amended by Act No. 484, S. 351, approved September 19, 1939, as is inquired about by you, should be remitted to the State Treasurer for credit to the State Highway Department. You will note that the provisions of the above named 1939 act do not propose to amend Section 16 of the above named 1932 act (General Acts 1932, at page 73), which provides as follows:

"USE OF FINES AND FORFEITURES. Section 16. All fines and bond forfeitures collected under the provisions of this Act shall be credited to the Commission and disbursed by it for the enforcement of this Act."

The word "commission" is defined by Section 2 of the above named act of 1932 as follows:

"'Commission' shall mean the State Highway Department and the State Highway Commission of Alabama."

You, of course, are familiar with the provisions of Act No. 13, S. 23, approved February 3, 1939 (General Acts, 1939, page 9, Pamphlet), which creates the present Highway Department and provides that whenever in the laws of the State of Alabama the terms "State Highway Department" or "State Highway Commission" are used, the same shall mean the "State Highway Department."

In reply to your second question, I wish to advise that, in my judgment, the provisions of Act No. 156, S. 143, approved March 16, 1939 (General Acts, 1939, page 229, Pamphlet), are applicable to the offense here under consideration.

The determination of your second question is dependent upon the answer to the question of whether or not Act No. 484, S. 351, approved September 19, 1939, constitutes a pro tanto amendment of the Alabama Highway Code as amended, governing certain operations of motor trucks upon the highways of the State of Alabama. I wish first to refer you to the provisions of Act No. 484, S. 351, approved September 19, 1939, and advise that this act is an amendment of certain parts of Act No. 58, H. 112, approved October 6, 1932 (General Acts, 1932, page 68), which in turn is a pro tanto amendment of Section 80 of Act No. 347, H. 391, approved August 23, 1927 (The Alabama Highway Code). A reading of the act of 1932, above referred to, reveals that its provisions repealed Act No. 146, H. 52, approved March 10, 1931 (General Acts, 1931, page 208. Section 8 of the above named Act of 1932 provides as follows:

"Section 8. No person shall operate any motor vehicle used primarily for the transportation of property or any motor truck or semi-trailer truck on any highway outside cities or incorporated towns at a greater speed than 30 miles per hour, and inside the limits of cities and incorporated towns the maximum speed limits shall be 20 miles per hour."

You will note from a reading of all the above cited acts of the Legislature that the same general subject matter is treated in specific parts and in a specific manner by parts of each act named. Among other things, it is worthy of note that each act regulates height, weight, length and speed of motor vehicles operated on Alabama highways generally. It is likewise noteworthy that the "Alabama Highway Code," supra, provides legislation governing certain subjects also dealt with in the subsequent acts of 1931, 1932 and 1939, which are pro tanto amendments of the Alabama Highway Code of 1927.

Reference to Section 80 of the named act of 1927, which is the original "Alabama Highway Code," is helpful in our search for the true legislative intent which promoted the acts under consideration. The same general subject matter concerning height, weight, width, etc. of vehicles carrying loads is found here as is found in each subsequent act named. The General Acts of 1931 referred to, supra, serve to amend certain of these requirements of height, weight, width, etc. of vehicles carrying loads, and is in turn amended by the terms of the named 1932 act, which is further amended by the named act of 1939. It would seem indisputable, therefore, that the named 1939 act is a pro tanto amendment of the "Alabama Highway Code," as amended, enacted in 1927, as shown hereinbefore.

The case of **Pharr v. Whittle**, 237 Ala. 124, 185 So. 895, holds that courts of the justices of the peace have final jurisdiction of the trial violations of the "Alabama Highway Code."

You will note that the provisions of Act No. 156, S. 143, approved March 16, 1939, supra, refer to the "Alabama Highway Code," "Rules of the Road" and the "Highway Patrol Act," and influence the charging of fees in courts having limited or inferior jurisdiction. Said act provides as follows:

"Section 1. That in all misdemeanor cases for violations of the State Highway Code, the State Highway Patrol Act and the rules of the road cognizable in Justice of the Peace Courts, courts created in lieu of Justice of the Peace courts, County Courts, Inferior Courts, Law and Equity Courts, or courts of like jurisdiction, where the defendant pleads guilty and no appeal is taken, no fee shall be taxed or collected in said courts for trial, solicitor's fees, or entering judgment in such cases.

"Section 3. That all laws and parts of laws, general, special and local, in conflict with the provisions of this Act be and the same are hereby expressly repealed.

"Section 4. That this Act shall become effective upon its passage and approval by the Governor or its otherwise becoming a law."

It is, therefore, my judgment that the above named Act No. 156, S. 143, approved March 16, 1939, supra, is applicable to the violations here under consideration. See opinion of the Attorney General to Hon. W. H. Quillin, Judge, Law and Equity Court of Franklin County, under date of October 20, 1939. For your further information regarding the operation of Act No. 156, supra, I wish to refer you to an opinion of the Attorney General addressed

to Hon. B. P. Singleton, Chief Examiner of Public Accounts, under date of December 18, 1939.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31, 1940.

Hon. Brooks Toler,
State Forester,
Capitol.

Forestry Division, Department of Conservation—

May not devote revenue from timber leases of unused lands to expense of administration of department and forest culture. Code, 1923, Section 989; Act No. 23, H. 81, approved February 5, 1935, (General Acts, 1935, p. 38, Section 1); Act No. 161, S. 140, approved March 2, 1937 (Acts 1936-37, Extra Session, p. 183); Constitution, 1901, Sections 71-2.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated November 12, 1939, which follows:

"Re: Request for an opinion on the status of Salt Springs Land and Chickasaw State Park.

"On April 11, 1928, a letter was written by Col. Page S. Bunker, who was at that time State Forester, to the Governor of Alabama, requesting that certain Salt Springs Land in Clarke County be designated as State Forests. This letter was approved by the Governor and a copy of same is as follows:

"April 11, 1928

"The Governor
State of Alabama,
Montgomery, Alabama.

"Sir:

"Pursuant to the Provisions of Section 6, Act of September 6, 1927, No. 635, and to the action of the State Commission of Forestry at its regular semiannual meeting April 6, 1928, it is recommended that the following

described lands be designated as State Forests, subject to existing leases, contracts and other rights pertaining to such lands:

Section	Township	Range	Meridian
21	5 N.	2 E.	St. Stephens
28	5 N.	2 E.	St. Stephens
21	7 N.	1 E.	St. Stephens
22	7 N.	1 E.	St. Stephens
27	7 N.	1-E.	St. Stephens

Very respectfully,

Page S. Bunker,

State Forester.

"Approved this 17 day of April, 1928.

Governor.

"The old State Commission of Forestry, which is now the Division of Forestry of the Department of Conservation, has assumed management of and jurisdiction over this Salt Springs Land since the approval of the above letter.

"The timber leases which were in effect at the time of this transfer have expired, and it is now the desire of this Division to make additional timber leases on this land. We anticipate using the revenue to be derived from such leases to further the practice of Forestry upon this land and other State Forests. We, therefore, request your opinion as to the legality of such procedure.

"Chickasaw State Park which is located on Section 16, Township 16 Range 3 East, Marengo County, Alabama, was selected by the State Forester as a State Park by authority of the following letter:

SELECTION LIST

(Section 6, Act approved Sept. 6, 1927, No. 635.

Acts of 1927, p. 725)

"Pursuant to the directions contained in Section 6 of the Act of the Legislature of Alabama approved Sept. 6, 1927, No. 635, Acts of 1927, p. 725, the Alabama State Commission of Forestry hereby lists the following State Lands to be devoted under the direction of the Governor to the purposes of forest culture or State Parks under the administration of the said State Commission of Forestry as State Forests or State Parks:

"Section 16, T. 1 N., R. 2. W., St. Stephens Meridian; Section 16, T. 16 N., R. 3 E. St. Stephens, Meridian, except the South Half of the Southwest Quarter; Section 16, T. 7 N., R. 8 W., Tallahassee Meridian.

Alabama State Commission of Forestry

By _____

Secretary & State Forester.

"Approved:

Bibb Graves, Governor

5-26, 1938.

"It is now the Department's desire to practice selective cutting of timber on this area and use the revenue derived therefrom for the purposes of the Department.

"We, therefore, request your opinion on the legality of this procedure."

From the foregoing, it appears that the lands above described have been designated as "unused lands, owned absolutely by the State," and so listed under the provisions of Act No. 635, So. 413, approved Sept. 6, 1927 (Acts 1927, p. 725, Section 6).

Section 6 of the Act provides that such lands "be devoted to forest culture, or to the purposes of State Parks, under the administration of the State Commission of Forestry, as State Forests or State Parks."

The power to sell, exchange or lease such lands is expressly conferred on the Commission by Act No. 161, S. 140, approved March 2, 1937 (Acts 1936-7, Extra Session, p. 183), amending Section 989, Code, 1923, prescribing the duties of the Commission.

The power so conferred is to be exercised by the Commission "when in its judgment it is advantageous to the State to do so in the highest orderly development and management of State Forests and State Parks and Parkways," subject to existing tracts.

Act No. 23, H. 81, approved February 5, 1935 (Acts, 1935, pp. 41-2), amending Section 1005, Code, 1923, in effect provides that all occupation licenses or privilege taxes imposed by the State for engaging in any business dealing with timber or timber products, and the receipts not to exceed \$50,000 per annum derived from the sale and redemption of lands sold for taxes and purchased by the State, less the counties' share or part of such taxes or receipts, shall constitute the State Forestry Fund, to be used exclusively for the administration of the Forestry Commission Law.

I find no express provision of law, however, as to revenue from timber leases under the aforementioned Act No. 161; and so upon the principle that *expressio unius exclusio est alterius*, it follows that such revenue is not a part of the Forestry Fund for administration of the Forestry laws.

It is to be observed also, Section 6 of the Act of September 6, 1927 (Acts 1927, p. 725) devoting the lands in question to "forest culture" under the **administration** of the Commission cannot be construed as an appropriation to the Commission or to the Department of Conservation, its successor, of revenues from such timber leases for the purposes of the Department.

Section 72 of the Constitution of 1901 forbids the payment of money out of the treasury except upon appropriations made by law, and no such appropriation appearing to have been made, the Department is, in my opinion, without authority to use the funds from timber leases, for any purpose whatsoever.

Nachman et al v. State Tax Comm. et al., 233 Ala. 628, 173 So. 25 (1937)

In that case it is said:

"In reply to this insistence it is sufficient to point out that the act does not undertake to make any appropriation within the meaning of section 71 of the Constitution. It is undoubtedly within the competence of the Legislature in levying a tax to provide, in the same bill, into what fund of the State the tax money when collected shall be paid, whether into the general fund, or into any special fund. It is but earmarking (Webster's New International Dictionary, p. 808; 19 Corpus Juris, p. 852, note 68; 14 Cyc. p. 1131, note 72; 3 Words and Phrases, Third Series, p. 113; 17 Am. Digest (Cent. Ed.) page 1704; Bouv. Law Dict. (Rawle's Third Rev.) p. 964) the fund, thereafter to be expended, on **due appropriation**, for the purposes for which the tax was levied and collected. **To provide that certain funds derived from particular sources shall be paid and used for designated purposes of government is in no sense an appropriation as contemplated by section 71 of the Constitution.**"

The principle would seem to be well established, and to admit of no question that all revenues accruing to the State from whatever source must flow into the State Treasury, to be drawn therefrom only upon compliance with Section 72 of the Constitution of 1901, viz., by express appropriation, "on warrant drawn by the proper officer," and pursuant to law.

Report, Attorney General, 1920-22, p. 493; State Ex rel. etc. v. Henderson, Governor, 199 Ala. 244, 74 So. 344.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

January 31, 1940.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—

Under Section 232 of the Revenue Act of 1935, the State Comptroller is the only official with authority to determine whether or not a tax sale of property was erroneous and to set same aside; and unless the tax sale is so set aside (although said sale may be void) the tax assessor has no authority to assess said property as an escape. When Section 232 of the Revenue Act of 1935 is not applicable, the tax sale of property, although erroneous, can be set aside only by proper court procedure; and the tax assessor cannot assess said property as an escape in the absence of a proper judgment from a court of competent jurisdiction.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 9, 1939, in which you request my opinion as follows:

"On May 27, 1939 we requested an opinion from you regarding the validity of a sale for taxes of lands assessed to the Lyons Company. On August 2, 1939 you rendered an opinion to the effect that the sale was void for want of regularity in advertising. Acting upon this ruling, I forwarded to the State Land Commissioner by certificate, supported by that of the Tax Collector and the Tax Assessor, certifying that the sale in question was void. The State Land Commissioner, in reply, advised me that he declined to cancel this sale from his records.

"It happens that the lands involved in this matter are extensive and that the taxes against them amount to a very large sum. The Lyons Company and their constituents are very anxious to clear their land of taxes in order to proceed with certain transactions, but seem to be in a position of not being able to pay the taxes on their land.

"Our Tax Assessor, rightfully in my opinion, refuses to make an escape assessment against the land involved, until the State Land Commissioner has marked the property from his records, or until an official opinion is received from you to the effect that such cancellation on the Commissioner's part is irrelevant. On the other hand, according to an opinion rendered me on February 15, 1938, I may not accept a redemption of the lands in question, since the sale thereof was void.

"Therefore, the premises considered, I should appreciate your official opinion regarding the following points:

"1. In cases of sales of land void for want of regularity, what official is charged with the setting aside of such sale, and what procedure must be followed in the setting of such a sale aside?

"2. In cases of sales of land void for want of regularity, what effect does the refusal of the State Land Commissioner to cancel the sale from his records have on the authority of the Tax Assessor to make an escape against the land, and may such an escape assessment be made regardless of whether or not the State Land Commissioner, or anyone else concerned by law with lands sold for taxes, marks the sale from his records, provided that I have certified that the sale in question is void for want of regularity?

"3. In the event that you rule in question No. 1 that I am the proper official to set a sale aside for want of regularity, is the determination of whether or not such a sale is void for irregularity within the scope of my judicial powers as Probate Judge?"

The only statutory authority relative to setting aside a tax sale, void for want of regularity, that I have been able to find, is Section 232 of Act No. 194, H. 324, approved July 10, 1935, (General Acts, 1935, page 256), which is the Revenue Act of 1935, and provides as follows:

"Section 232. For the real estate bid off for the State in each case the Judge of Probate shall make out a certificate of purchase to the State of like import to the one provided for in the preceding section, and deliver the same to the Tax Collector, who shall, on final settlement, deliver all certificates received by him from the Judge of Probate to the State Comptroller, who shall examine carefully all certificates of purchase of real estate where the same were bid in for the State at tax sale. When the same are received by him, and if, in his opinion, such sale was erroneous for want of regularity, proper or sufficient description, error in advertising or for any other cause that may appear from such certificates, he shall so declare it and return the certificate to the Judge of Probate, and charge the account of the officer making the error with all taxes, interest, fees, and costs involved in said sale. The Comptroller shall notify the Judge of Probate who issued the certificate of such cancellation, and shall also notify the Tax Assessor of the County in which the property is situated, and direct him to assess the property as an escape for the years in which it was subject under existing laws. The Comptroller when he has settled the accounts of the Tax Collector shall deliver to the State Land Commissioner all certificates of land bid in for the State which have been accepted by him, and said Land Commissioner shall cause the same to be recorded in a book kept in his office for that purpose and properly indexed for convenient reference. Lands bid for the State shall not thereafter be assessed except as herein provided until the same have been redeemed or sold by the State."

Under the provisions of the above quoted section, the State Comptroller is the only official who has authority to set aside a tax sale, void for want of regularity. This authority is not conferred upon any other official. Under said section, when the sale is set aside by the Comptroller, the Tax Assessor is in turn notified and he assesses the property as an escape for the years in which it was subject to taxation under existing laws. It will be further

noted that when lands are bid in by the State they shall not thereafter be assessed except as provided in said section until the same have been redeemed or sold by the State. In other words, under said section, the tax assessor has no authority to assess property sold under a tax sale, although the sale may be void, unless same is so declared to be void by the State Comptroller. The duties of the tax assessor and the probate judge in respect to the above quoted section are, in my judgment, merely ministerial.

However, in my opinion, said Section 232, *supra*, is applicable only to tax sales that are shown on the final settlement of the tax collector in respective years in which the final settlement is made. It will be noted that the State Comptroller acts upon the certificates delivered by the tax collector when the tax collector makes his final settlement. Therefore, said section is not now applicable to the facts set out in your inquiry, as said sale occurred on October 16, 1932 (See opinion of the Attorney General to Judge of Probate, Mobile County, under date of August 2, 1939).

The premises considered, it is my opinion that the only recourse to have said assessment set aside as being void for want of regularity is by proper court procedure. The probate judge would have no authority in this matter, as his duties in connection with filing the proper certificate, etc., relative to voiding tax sales, are, as heretofore stated, merely ministerial. It is also my judgment that the tax assessor would have no authority to assess the property in question as an escape in the absence of a proper judgment from a court of competent jurisdiction.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

January 31, 1940.

Hon. A. H. Collins, Supt.,
Department of Education,
Montgomery, Alabama.

Use Tax—Funds collected by the State Department of Revenue from Use Tax levy between February 28, 1939, and September 13, 1939, should be held in State Treasury until appropriated by the State Legislature.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 9, 1939, in which you request my opinion as follows:

“Act No. 67, approved February 28, 1939, provides for the levy of a so-called Use Tax. Section 22 of this act provides the following:

"Section XXII. All taxes, fees, interest and penalties imposed and all amounts of tax herein required to be paid to the state under this act must be paid to the Department of Revenue of Montgomery, Alabama, with remittances payable to the State Treasurer of Alabama. The funds received or collected by the department under the provisions of this act shall be, without delay, deposited in the State Treasury. The amount remaining after payment of all expenses incurred by the department in the collection of such funds or the administration of this act, shall be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the State.'

"Act No. 376, approved September 13, 1939, amended Section 22 of Act No. 67, approved February 28, 1939, as follows:

"Be it enacted by the Legislature of Alabama:

"Section 1. That Section XXII of an Act entitled "An Act to further provide for the general revenue of the State of Alabama," approved February 28, 1939, be and the same is hereby amended to read as follows: Section XXII. All taxes, fees, interest or penalties imposed and all amounts of tax herein required to be paid to the State under this Act must be paid to the Department of Revenue at Montgomery, Alabama, with remittance payable to the State Treasurer of Alabama. The funds received or collected by the Department under the provisions of this Act shall be, without delay, deposited in the State Treasury. The amount remaining after payment of all expenses incurred by the Department in the collection of such funds or the administration of this Act, shall be paid into the Special Educational Trust Fund to be expended as the other moneys in said fund.

"Section 2. All laws and parts of laws, general, special or local, in conflict with the provisions of this Act be and the same are hereby expressly repealed.

"Section 3. That this act shall become effective immediately upon its passage and approval by the Governor or its otherwise becoming a law.

"Approved September 13, 1939.'

"Between February 28, 1939, and September 13, 1939, the sum of \$68,-256.58 was collected from the Use Tax. Your opinion is requested on the following questions:

"1. Did the amount of money collected from the Use Tax under the provisions of Section 22 of Act No. 67, approved February 28, 1939, between the period February 28, 1939, and September 13, 1939, constitute an additional appropriation for the purpose of paying the salaries of elementary and high school teachers?

"2. Assuming that the answer to question 1 is in the affirmative, would the fact that the amount collected from the Use Tax between

February 28, 1939, and September 13, 1939, had not been paid out prior to September 13, 1939, prohibit the Comptroller from releasing said appropriation at the present time?

"3. In the event that you determine that there has been no appropriation of these funds, but find that the Act approved September 13, 1939, did not affect Use Tax moneys collected prior to that date should such moneys be held in the Treasury awaiting a future appropriation or should they be covered into the general fund?

In my opinion, the provisions of the Use Tax Act of 1939 before amendment, requiring the amounts collected thereunder to be paid into the Special Educational Trust Fund to be expended only for salaries of teachers in the elementary and high schools of the State, cannot be deemed an appropriation of such moneys. The purpose of the Legislature in including Section 22 in the Use Tax was to designate the fund of the State, into which the tax money, when collected, should be paid. It amounts rather to an earmarking of such funds than an appropriation thereof.

In *Nachman v. State Tax Commission*, 233 Ala. 628, 634 (7, 8), 173 So. 25, a similar conclusion was reached with reference to that provision of the Gross Receipt Tax Act (General Acts, 1935, p. 256) which provided that the proceeds of the tax should be devoted first to the relief of the owners of homesteads to the extent of \$2,000 of property and, second, to the Educational Trust Fund, the court holding that the act did not undertake to make any appropriation within the meaning of Section 71 of the Constitution. The court stated:

"It is undoubtedly within the competence of the Legislature in levying a tax to provide, in the same bill, into what fund of the State the tax money when collected shall be paid, whether into the general fund, or into any special fund. It is but earmarking (Webster's New International Dictionary, p. 808; 19 Corpus Juris, p. 852, note 68; 14 Cyc. p. 1131, note 72; 3 Words and Phrases, Third Series, p. 113; 17 Am. Digest (Cent. Ed.) page 1704; Bouv. Law Dict. (Rawle's Third Rev.) p. 964) the fund, thereafter to be expended, on due appropriation, for the purposes for which the tax was levied and collected. **To provide that certain funds derived from particular sources shall be paid and used for designated purposes of government is in no sense an appropriation as contemplated by section 71 of the Constitution.**" (Emphasis supplied)

There being no appropriation of the funds collected under the Use Tax by the provisions of the Act itself, before such money can be released it becomes necessary to look elsewhere to determine whether there was ever an appropriation of these funds. An intensive search of the statutes fails to reveal any law which might possibly be interpreted as an appropriation of this money.

This brings us to a consideration of whether the provisions of Act No. 376, approved September 13, 1939, amending Section 22 of Act No. 67, and providing that the funds collected under the Use Tax should be paid into the Special Educational Trust Fund to be expended "as the other monies in said fund" operated to affect in any manner moneys collected under the Use Tax Act prior to September 13, 1939.

In my opinion, the fact that these funds were not released prior to September 13, 1939, does not in any manner affect them at the present time. Act No. 376 must be construed as having a prospective, not retrospective, operation—this in accordance with the rule generally applicable to such legislative enactments. 59 C. J. 1181, Section 719.

In my opinion, the Legislature by Act No. 67 earmarked the Use Tax Funds for salaries of teachers in elementary and high schools, (see opinion to Hon. I. C. Heck, State Comptroller, Capitol, under date of May 30, 1939) and this declaration of use to which the funds should be devoted continued operative until September 13, 1939, the effective date of Act No. 376. The Legislature has stated by these acts, Act No. 67, Section 22, and Act No. 376, that moneys collected under the Use Tax Act from February 28, 1939, to September 19, 1939, shall be deposited in the Special Educational Trust Fund to be expended only for salaries of teachers in elementary and high schools of the State, whereas, all Use Tax moneys collected after September 13, 1939, shall be paid into such Special Educational Trust Fund to be expended as other moneys in such fund. The result is that the funds collected before September 13, 1939, must be held in the Special Educational Trust Fund until such time as the Legislature provides for their disposition.

Nor does the fact that the moneys were not paid out prior to October 1, 1939, mitigate against the conclusion reached. Any such contention is disposed of by the case of **Long v. Alabama Highway Dept.**, 234 Ala. 142, 174 So. 41, and cases cited therein. The moneys collected are trust funds rather than general funds of the State and, therefore, do not come within the Budget Act (General Acts, 1932, Extra Session, page 35). Cf. **Abramson v. Hard**, 229 Ala. 2, 125 So. 590.

The foregoing premises cause me to advise you that there has been no legislative appropriation out of the funds collected from the Use Tax between February 28, 1939, and September 13, 1939; that the moneys so collected between such dates and required at the time collected to be paid into the Special Educational Trust Fund to be used exclusively for the payment of teachers' salaries in the elementary and high schools of the State were not affected by the Act of September 13, 1939, nor would they revert to the general fund on October 1, 1939, for the reason that they were trust funds; and finally, that such funds should be held in such trust fund pending an appropriation thereof by the Legislature, there being no authority to disburse such sums in the absence of an appropriation. Constitution of Alabama, 1901, Section 72.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 2, 1940.

Hon. J. C. Grady,
Judge of Probate,
Chambers County,
LaFayette, Alabama.

Taxation—Deed Filing Tax—

Deed filing tax payable upon conveyance of all the property of a dissolved corporation to another corporation holding all the capital stock of the grantor corporation, in consideration of surrender by grantee to grantor of said stock.

General Acts of 1935, pages 256, 456, Schedule 46 of Section 348.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated January 25, 1940, which reads as follows:

“Will you please examine the enclosed instrument filed in this office for record and advise me if same carries a deed tax, returning same to me with this advice.”

The legal effect of the instrument submitted for examination is to divest title to real estate therein described out of the grantor and to vest the same in the grantee. The instrument is, therefore, in every sense of the word a deed within the meaning of Schedule 46 of Section 348 of Act No. 194, H. 324, approved July 10, 1935, known as the Revenue Act of 1935 (General Acts, 1935, pages 256, 456); and as such is subject to the privilege or license tax imposed upon the record of deeds, to be computed by ascertaining the value of the real estate, and of the rights and interests, thereby conveyed.

Said instrument does not, in my opinion, come within the exceptions referred to in the statute. The consideration recited for the conveyance, to wit, surrender by the grantee to the grantor of all of the capital stock of the grantor corporation theretofore held by the grantee corporation is in no sense “a nominal consideration for the purpose of perfecting the title to real estate.” The legal effect of the conveyance is not to perfect title, but in fact to transfer a legal title from one legal entity to another.

In support of this opinion reference is made to the Attorney General's opinion dated September 19, 1939, to Hon. G. H. Howard, Judge of Probate of Elmore County, found in Vol. XVI at page 251 of the Quarterly Reports of the Attorney General, and the former rulings of this office therein, in reference to conveyances by a trustee to the *cestui que trustents*.

See also **Hawkins v. Pure Oil Company**, 232 Ala. 660, 169 So. 307.

This case is exactly in point, and holds that the deed tax is due to be paid on record of a deed to all the property of a dissolved corporation to another corporation holding all the capital stock of the former corporation, under the Revenue Act of 1927 (General Acts of 1927, page 163 Section 21½).

I am returning the photostatic copy of the instrument submitted for examination, as requested.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 2, 1940.

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Motor vehicles—Trucks—

1. State Highway Director may issue special permit for stated period not exceeding one year for the transportation of oversize, overweight or overlength commodities that may not be reasonably dismantled.

2. Persons hauling loads of "poles, logs, lumber, structural steel, piping and timber" exceeding the maximum length prescribed by statute, must first secure permit so to do from the State Highway Director.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 1, 1939, in which you request my opinion as follows:

"I am handing you herewith Act No. 484 amending Act No. 58 of the General Acts of 1932.

"Section 1 of the attached Act No. 484 amends Section No. 4 of Act 58 of 1932 as to weight.

"Paragraph (e) of said amendment reads as follows:

"(e) Under special and extraordinary circumstances, the Highway Director may in isolated cases only, grant to any one the right to haul a heavier load than is herein specified over a route to be

designated by the Highway Director, provided said load is not harmful to the roads or bridges along said route, and provided further that no county roads are included in said route.'

"I will thank you to construe this paragraph for me. I am at a loss to know just how to define special and extraordinary circumstances in isolated cases only.

"We have numerous contractors, machinery dealers and general hauling contractors who make a practice of hauling loads of this class that cannot be reasonably dismantled and where it is necessary to deliver such loads off of railroads, would this class of hauling be classed as hauled under special and extraordinary circumstances and could this class of hauling come under 'isolated cases only'. This is quite a general practice at present.

"Under 'Exemptions', Section 10 of Act No. 58 of 1932, paragraph (c) reads as follows:

"The Commission shall prescribe by orders of general application rules and regulations for the issuance by it (without cost to the applicant) of special permits for stated periods not exceeding one year for the transportation of such oversize, over-weight or over-length commodities as cannot be reasonably dismantled, etc.'

"Under this Section 10 which has not been amended, could I use the condition,—'commodities that cannot be reasonably dismantled,' to cover the wording in the new amendment—'special and extraordinary circumstances in isolated cases only.'

"Section 3 of said amendment also provides in amending Section 7 of Act No. 58 of 1932 as follows:

"Length. No person shall operate on any highway any motor truck whose length, including any part of body or load shall exceed 40 feet, provided, however, that loads of poles, lumber, structural steel, piping and timber may exceed the length herein fixed.'

"Under this section is it the intent of the amendment to permit the hauling of overlength commodities mentioned without regulation or does the provision of Section 10 of Act No. 58 of 1932 hold, in that a special permit for excessive and dangerous over-lengths must be secured from the Highway Department?"

The statute for consideration in your request is Act No. 58, H. 112, approved October 6, 1932 (General Acts, 1932, p. 68) as amended by Act No. 484, S. 351, approved September 19, 1939. The pertinent parts of said statute, as amended, are Subsection (e) of Section 4, as amended, Section 7, as amended, and Subsection (c) of Section 10, which read, respectively, as follows:

"(e) Under special and extraordinary circumstances the Highway Director, may in isolated cases only, grant to any one the right to haul

a heavier load than is herein specified over a route to be designated by the Highway Director, provided said load is not harmful to the roads or bridges along said route, and, provided, further, that no county roads are included in said route."

"Section 7. LENGTH. No person shall operate on any highway any motor truck whose length, including any part of the body or load, shall exceed 30 feet, nor any semi-trailer truck, whose length, including any part of body or load shall exceed 40 feet, provided, however, that loads of poles, logs, lumber, structural steel, piping and timber may exceed the length herein fixed."

"(c) The Commission shall prescribe by orders of general application rules and regulations for the issuance by it (without cost to the applicant) of special permits for stated periods not exceeding one year for the transportation of such over-size, over-weight, or over-length commodities as cannot reasonably be dismantled, and for the operation of such super-heavy or over-size motor trucks, semi-trailer trucks, and trailers, whose gross weight, including load, height, width, or length, may exceed the limits prescribed by sections 4, 5, 6 and 7 hereof, or which in other respects fail to comply with the requirements of this Act, as may be reasonably necessary for the transportation of such oversize, overweight, or overlength commodities as cannot reasonably be dismantled. Said permits shall be issued and may be renewed upon such terms and conditions, in the interest of public safety and the preservation of the highways, as the Commission may in its discretion require. Said Commission may, in its discretion, require, as a condition to the issuance of such permit, that the applicant give bond, with or without surety as the commission may require, to indemnify the State, and or the counties thereof, against damage to roads or bridges, resulting from the use thereof by the applicant. Each such permit and bond, if the commission so authorizes, may cover more than one motor vehicle operated by the same applicant. The operation of motor trucks, tractors, semi-trailers or trailers, in accordance with the terms of any such permit shall not constitute a violation of this Act, provided the operator thereof shall have said permit, or a copy thereof, authenticated as the Commission may require in his possession. The operation of any motor-truck, tractor, semi-trailer or trailer, in violation of the terms of any such permit, shall constitute a violation of this Act."

The question of what constitutes "special and extraordinary circumstances * * * in isolated cases only" presents a question of fact upon which this office cannot pass in the abstract. Each individual case must stand upon its own peculiar facts.

It seems very clear from a reading of the provisions of Subsection (c) of Section 10 of Act No. 58, supra, that permits may be issued in accordance with the provisions thereof to contractors, machinery dealers and general hauling contractors who make a practice of hauling loads that cannot be reasonably dismantled, which loads are oversize, overweight or overlength, for the hauling of such loads. However, in my opinion, any person who makes a practice of hauling such loads would not come within the provisions of Subsection (e) of Section 4, as amended, supra, which applies to "special and extraordinary circumstances * * * in isolated cases only," which has an entirely separate field of operation from, and is not amendatory of, Subsection (c) of Section 10, supra.

The only change made in Section 7, *supra*, by the amendment was to add to that class of loads whose length might exceed the length fixed by statute loads of "structural steel" and "piping."

The question of whether or not persons hauling loads of "poles, logs, lumber and timber" in excess of the length fixed by statute under Section 7 of the original act could do so without securing a permit from the State Highway Commission (Director) or had to first secure a permit has been heretofore considered by this office. In an opinion rendered to Hon. Gaston Scott, Chairman, Highway Commission, Capitol, under date of March 21, 1936, Quarterly Report of Attorney General, Vol. II, p. 325, we held that such loads, i. e., loads of poles, logs, lumber and timber, whose length exceeded the length fixed by statute, could be hauled only under permits issued by the State Highway Commission (Director), as provided by Subsection (c) of Section 10, *supra*, and you have advised me that heretofore your department has interpreted this statute as requiring persons hauling such loads whose length exceeded the length fixed by statute to first secure a permit. This section was reenacted in precisely the same terms (so far as this question is concerned) by Act No. 484, *supra*. Consequently, even though it might be argued that persons hauling such loads whose length was in excess of the length prescribed by statute could do so as a matter of right and without first securing a permit from the State Highway Director, in my opinion such argument is not well taken, especially in view of the reenactment of the statute in precisely the same terms (so far as this question is concerned) after an administrative construction to the effect that persons hauling such loads, the length of which exceeded the length prescribed by statute, should first secure a permit from the State Highway Director.

Where the construction of a statute by the administrative department charged with the duty of enforcing or applying the statute has been uniform for a number of years and the statute is reenacted in precisely the same terms (so far as this question is concerned), the enactment of the statute without change may be treated as a legislative approval of the departmental construction of the statute, quite as persuasive as the reenactment of a statute which has been judicially construed. See *State v. H. M. Hobbie Grocery Co.*, 225 Ala. 151, 142 So. 46, and authorities therein cited; *Alabama Public Service Commission v. Jones*, 236 Ala. 370, 182 So. 452.

The premises considered, it is my opinion that persons hauling loads of "poles, logs, lumber, structural steel, piping and timber" whose length exceeds the length prescribed by statute must first secure a permit so to do from the State Highway Director.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 3, 1940.

Hon. H. B. Hamner,
Superintendent of Education,
Russell County,
Phenix City, Alabama.

Schools—Contracts—

When a payment of part of the contract price for the construction of a school building was contingent on a condition precedent, which has not been fulfilled, neither the county board of education nor the State is liable for such amount.

There is no authority to pay a contractor rent on said school building located on land which is deeded to the State. The contractor cannot legally keep the building from being used for public school purposes.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 27, 1940, in which you request my opinion as follows:

"In 1922, the Russell County Board of Education contracted with a building contractor to erect a school-house. As a part of the contract price to be paid, we were to get \$500.00 from the Department of Education as state-aid. In order to get this \$500.00 state-aid, we had to raise twice as much in local funds.

"It was clearly understood with the contractor that the \$500.00 state-aid was part of his contract price, and that it would be necessary for him to use the plans and specifications furnished by the Department of Education at Montgomery, in erecting the building.

"The regular contract form of the State Department of Education was used.

"It was also clearly set out in the contract that the \$500.00 state-aid would not be paid to the County Board of Education until the entire work of the contractor had been accepted by the building inspector of the State Department of Education.

"The State-aid warrant of \$500.00 was issued to our County Treasurer of School Funds, with the condition attached that it could be paid only when the State Superintendent released it for payment, after the final acceptance of the building by the state building inspector. Another condition of the \$500.00 warrant was that it would be good for twelve months from date of issue. It was also included in the building contract that the building must be completed within the twelve months period in which the \$500.00 warrant was good.

"At the end of the twelve months after the building had been begun, the work had not been completed and accepted by the state. Whereupon, at the request of the County Board of Education, the State Superintendent extended the life of the \$500.00 warrant another twelve months.

"Before the expiration of the second twelve months, the building had been inspected by the inspector and had been rejected because certain parts of the building were not according to state plans and specifications. The contractor made certain changes in trying to comply with the state plans and specifications.

"After the contractor made these changes, the state building inspector made another inspection, and again rejected the building because certain parts still did not comply with state plans and specifications. About this time, the second twelve months period for which the \$500.00 state-aid warrant was issued expired. The Chairman of the County Board of Education, the County Supt. of Education and the contractor forthwith called upon the State Superintendent of Education and requested him to extend the warrant still a third twelve months period. This he declined to do, stating that after extending it the second twelve months period, it could not be extended the third. It then became necessary for the County Treasurer of School Funds to return the \$500.00 warrant to the state superintendent of education. The \$500.00 was thereby lost to the building under construction, lost to the County Board of Education and lost to the contractor. The building has never been accepted by the State Building Inspector. The contractor admits even now that it was never accepted.

"Now after eighteen years, the contractor through his attorney has presented a claim to the County Board of Education for the \$500.00 which he still contends the state owes. The claim presented is against the state rather than the county board of education, but it purports to cite legal authority to show that the county board of education may still legally pay this claim if in its discretion, it decides to do so.

"The claim presented to the County Board of Education, in case the said Board does not pay the \$500.00, is also for rent on the school building in question. The said building has been used for school purposes all these years. The contractor has never forbid the use of it. At the completion of it eighteen years ago, he did not lock the building and keep the key. The building is located on two acres of land which were deeded to the state before the building was erected. The rest of the contract price besides the \$500.00 in question, was paid the contractor when due.

"Based upon all the above stated facts, please instruct us as follows:

"1. Is the \$500.00 claim of the contractor a legal claim against either the Russell County Board of Education, or the State of Alabama?

"2. Would it be a legal expenditure of school funds for the Russell County Board of Education to pay the contractor rent on the school building, located on land which is deeded to the state?

"3. Do you know of any financial settlement, besides the paying of the \$500.00, or the paying of rent, which either the state or the county board of education, might legally make with the contractor?

"In case there is no financial settlement that can be made with the contractor, can he legally keep the building from being used for public school purposes in the future?"

I am of the opinion that all of your inquiries should be answered in the negative.

You state that according to the contract the \$500.00 State-aid in question was not to be paid to the county board of education until the work of the contractor had been accepted by the Building Inspector of the State Department of Education. You further state that the said \$500.00 State-aid was a specific part of the contract price. Therefore, the said \$500.00 could not be paid to the contractor until the entire work had been accepted by the Building Inspector of the State Department of Education.

It appears that this condition precedent has not been met, and, therefore, it is my opinion that neither the county board of education nor the State is liable to the contractor for the said \$500.00.

I know of no authority whereby the county board of education can pay the contractor rent on the school building located on land which is deeded to the State, nor do I know of any other provision of law which would authorize the payment of the said \$500.00.

In addition to the fact that the condition precedent for the payment of the \$500.00 in question to the contractor has not been met, it appears that the work was completed some eighteen years ago. Therefore, any claim, even assuming same to be valid, would be barred by the statute of limitations whether the contract be under seal or not.—Sections 8943 and 8944, Code of Alabama, 1923.

The contractor, in my opinion, cannot keep the building from being used for public school purposes in the future. A contractor has no right to hold possession of a school building from a county board of education even though there may be a balance due on the contract.—**Opinion of Attorney General to State Superintendent of Education under date of November 26, 1932**, copy of which is enclosed herewith.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 3, 1940.

Hon. J. H. Dean, Chairman,
St. Clair County Board of Registrars,
Odenville, Alabama.

Registrars—Boards of Registrars—

No authority of Board of Registrars to hold sessions for registration other than specifically granted by statute.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of January 25, 1940, in which you request my opinion as follows:

"The Board of Registrars of St. Clair County advertised that they would hold ten days from January 22nd to Feb. 2nd, for the purpose of registering those desiring to register for the purpose of voting.

"On account of the snow we were unable to reach the Court House on Tuesday and Wednesday. Please advise if we can continue at this time two days longer than advertised and if not, can we readvertise for another date for these two days we failed to reach the Court House."

In answer to your inquiry, I call your attention to Act No. 289, S. 179, approved August 20, 1927 (General Acts, 1927, page 274), Michie's Alabama Code of 1928, Section 375, which provides in pertinent part as follows:

"The Board of Registrars in each county shall meet at the court house on the fourth Monday in January, 1928, and each two years thereafter, and shall remain in session ten working days for the registration of voters."

I wish to advise you in my opinion the registration periods in all counties in Alabama are governed by the exact provision of the law providing for the same. Quarterly Report of the Attorney General, Vol. IV, page 187.

This office has ruled that holidays are not excepted from the days that the Board meets. Biennial Report of Attorney General, 1934-36, page 612.

The Board of Registrars are not entitled to compensation for an illegal session. Biennial Report of Attorney General, 1936-38, page 84.

Citizens registered after the time prescribed by this section are not lawful voters and are not entitled to be placed upon the list as such. **Newton v. Herring**, 196 Ala. 455, 71 So. 679; **State v. Davison**, 196 Ala. 453.

I can find no provision of law permitting the Board of Registrars to extend the time of registration, but they must meet according to the mandates of the statutes regardless of inclement weather.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 5, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Court of County Commissioners—Sheriffs—

1. Court of county commissioners has control of all property of the county.
2. Sheriff has legal custody of the courthouse and grounds.
3. Court of county commissioners authorized to appoint janitor for courthouse.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of January 25, 1940, in which you request my opinion as follows:

“Please advise me whether the Sheriff or the Commissioners’ Court has charge of the Courthouse and grounds.

“Whose duty, for instance, is it to keep the Courthouse and grounds sanitary and clean.

“For specific instance, please advise me whether Commissioners’ Court has the right to remove a tree from the grounds of the courthouse and if the Commissioners’ Court so orders can the Sheriff intervene and prevent the removal of the tree. Is the Janitor for the Courthouse and grounds under the authority of the Sheriff or the Commissioners’ Court?”

Under the authority of Subdivision 1 of Section 6755 of the Code of Alabama, 1923, which has not been affected in pertinent part by subsequent amendments to this section, the court of county commissioners is vested with the authority "to direct and control the property of the county." Also Section 290 of the Code of Alabama, 1923, provides that the court of county commissioners has control of all property belonging to the county. However, Section 211 of the Code of Alabama, 1923, provides, "the sheriff has charge of the courthouse," and that he must "keep it and the grounds attached thereto in order." Therefore, it appears that the court of county commissioners has control of the courthouse and grounds and the sheriff has charge thereof, under the court's supervision. This dual authority has been specifically dealt with in the case of **White v. Hewlett**, 143 Ala. 374, 42 So. 78.

In speaking of the authority of the sheriff in this regard, the court in the **Hewlett** case, *supra*, said:

"This section gives him (the sheriff) the authority to do what is prescribed and does not interfere with or curtail the power of the court of county commissioners or board of revenue to control the courthouse."

From the case cited above, it appears that the court of county commissioners would have the right to remove a tree from the grounds of the courthouse and that the sheriff could not dispute this authority.

In regard to your inquiry concerning the janitor of the courthouse, permit me to refer you to an opinion of this office to Hon. H. D. Lynes, under date of February 21, 1938, Quarterly Report of the Attorney General, Vol. X, page 102, wherein it is stated as follows:

"In answer to your inquiry, I am of the opinion that the Court of County Commissioners is vested with the authority to appoint both the janitor for the courthouse and the janitor for the jail. Subsection 2 of Section 6755, Code of Alabama, 1923, as amended by Act 622, Acts 1931, p. 759, provides as follows:

"It shall be the duty of the court to provide a janitor for the court-house and to see that the janitor keeps clean and in a sanitary condition all court rooms, corridors, halls and offices in the court-houses of their respective counties."

Therefore, it appears that the janitor is under the direction of the court. However, the sheriff does have a duty to keep the courthouse and grounds in order, as is seen by Section 211, *supra*, but such duty is subservient to the orders of the court of county commissioners.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 5, 1940.

Hon. J. R. Aldredge, Chairman,
Board of Finance and Control,
Cullman County,
Cullman, Alabama.

1. Where the fine and forfeiture fund of a county has been abolished and the monies in the same transferred to the general fund of the county, and all claims against the county made payable out of the general fund, claims of officers for costs in criminal cases which have not been presented to the board of revenue, commissioners court or other like governing body within one year are barred.

2. Wherever a criminal case is nol prossed, the clerk would not be entitled to pay for trial, judgment and final judgment.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 24, 1940, in which you request my opinion as follows:

"With reference to our conversation in your office on January 18th, 1940 with reference to a request for an opinion from this office, I am quoting request of Oct. 28, 1939 as follows:

Cullman, Ala.

Oct. 28, 1939.

"Hon. T. S. Lawson,
Attorney General,
Montgomery, Ala.

"Dear Sir:

"Hon. Grady Gorham, Circuit Clerk of Cullman County has filed with Board of Finance and Control of Cullman County for payment claims covering the periods 1935, 1936, 1937 and a part of 1938 for fees in Nol Prossed and State Failed Cases as follows: Trial .50c each and judgment, Defendant, .25c each.

"Under Section 228 of Code of Alabama 1923 which is as follows: "Claims barred if not presented,—All claims against Counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

"Would these claims be barred by Statute of Limitation under the above Section of 1923 Code.

Yours very truly,

Board of Finance & Control,
Cullman County, Ala.

By..... Chairman'

"Also please advise in addition to this request if when a case is Noli Prosequi has the clerk a legal right to charge in his bill of costs for a trial, judgment, and final judgment.

"When an indictment is withdrawn and filed can the Clerk charge in his bill of costs for a judgment, and final judgment."

Under the general laws of the State the commissioners' courts, boards of revenue or other like governing bodies have no control or supervision of the fine and forfeiture fund of the county and claims payable out of this fund do not have to be audited and allowed by such court. **Palmer v. Fitts**, 51 Ala. 59; **Sanders v. Court of County Commissioners**, 117 Ala. 443, 23 So. 788. However, I find that your county is not operating under the general laws of the State in handling the monies belonging to the fine and forfeiture fund, but is operating under a local law approved September 25, 1915, Local Acts, 1915, page 487. This act was amended by an act approved August 11, 1919, Local Acts, 1919 page 55. These acts were held constitutional in the case of **Mitchell v. Graham**, 162 So. 135. By the original act, the fine and forfeiture fund of Cullman County was merged into the general fund of the county and all claims theretofore paid out of the fine and forfeiture fund are now paid out of the general fund of the county. In fact, the act, supra, abolished the fine and forfeiture fund of your county and transferred all the monies in this fund to the general fund, as provided by Section 10 of said act, as amended. This section is as follows:

"Section 10. That after the adjournment of the County Court and Circuit Court of Cullman County the sheriff and the clerk of said courts shall file with the Court of County Commissioners of said county, a statement of all cases finally disposed of, where the State fails to convict, or in which defendants have been convicted, and have been proved insolvent by the return of execution, 'No Property Found,' or in cases in which the State enters a Nolle Prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, showing the items of cost due them, the name of the defendant and the charges against them. Said statement shall be sworn to by the officer making same. If the court finds the account correct they shall order a warrant drawn on the County Treasurer for the amount of such account. And in all such cases disposed of since September 25th, 1915, where said fees have not been paid, such statement shall be filed by the sheriff and clerk, with the court of county commissioners within ninety days after the passage of this Act. And it shall be the duty of the county treasurer to pay the same out of the general fund of said county."

You will note that all claims of officers which would be, under the general law, paid out of the fine and forfeiture fund are now paid, under the local act, out of the general fund, and, therefore, must be sworn to and audited and passed by the commissioners' court or other like governing body before they can be paid. This being true, they are brought under the provisions of Section 228, Code of Alabama, 1923, which is as follows:

"Section 228. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

Therefore, these claims would have to be presented within one year from their accrual.

The first question in your additional request is, "Also please advise in addition to this request if when a case is Nol Prossed has the clerk a legal right to charge in his bill of costs for a trial, judgment, and final judgment?"

It is my opinion that this question should be answered in the negative. There could be no trial fee in a case that has been nol prossed as the word "trial," as here used, contemplates the passing on or settling of some controverted matter either by the judge or the jury, or where the defendant pleads guilty. Words & Phrases, 5th Series, Vol. 5, page 823. As to judgment or final judgment in nol prossed cases, there is no fee enumerated under Section 3739, Code of Alabama, 1928, Michie, which section has to do with fees or claims in criminal cases, for entering judgment except against the defendant. I call your attention to an opinion of this office written December 12, 1934, to Hon. S. M. Cobb, Clerk of the Circuit Court, Wilcox County. This opinion, which deals with the precise question you here propound, holds as follows:

"4. The Clerk of the Circuit Court is not entitled to twenty-five cents (25c) for entering a final judgment in 'State failed' and 'nol pros'd' cases.

"Section 3739 of the Code of Alabama does not enumerate such a fee in the fees listed which the clerk is entitled to charge in criminal cases. The Clerk of the Circuit Court is not entitled to this twenty-five cents (25c) fee for such final judgment entered for each defendant in cases where two or more defendants are jointly indicted and where the State fails to convict or there is a nolle prosequi in the case. The provisions of law for a clerk to receive a fee for entering judgments specifically states that such provisions cover the **entering of a judgment against each defendant** and where the State does not convict the defendant, or the State enters a nolle prosequi in the case, there is no judgment against the defendant. Where, in a case the indictment or the complaint is withdrawn and filed, there is no judgment against the defendant and no fee can be claimed for such service. There can be no judgment entered against a defendant, unless the defendant is convicted. The fee for entering judgment is not for entering a judgment in a case, but for entering the judgment **against the defendant.**"

Answering your second additional request, which is, "When an indictment is withdrawn and filed can the Clerk charge in his bill of costs for a judgment, and final judgment?", I call your attention to two opinions of this office found in Quarterly Report of Attorney General, Vol. XV, pages 222 and 247, respectively. The first of these opinions was written to Hon. B. P. Singleton, Chief Examiner of Public Accounts, under date of May 23, 1939; the other to the same person under date of May 31, 1939. These two opinions deal with the precise question you have here and give you the information requested.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 7, 1940.

Hon. John T. Eubanks,
County Solicitor,
Pickens County,
Carrollton, Alabama.

Counties—County Solicitor—

1. County under no obligation to furnish county solicitor with office.
2. If office of county solicitor is in court house, court of county commissioners **may** furnish him with telephone.
3. Court of county commissioners not required to furnish county solicitor with stationery and/or stamps.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of December 27, 1939, in which you request my opinion as follows:

"I am County Solicitor for Pickens County, Alabama. My office is elective now and I was elected at the last Democratic and Gen. elections for a term of four years. (Local Act provides for office in this County to be elective).

"I will appreciate your opinion on the following questions:

- "1. Please give me your opinion as to whether the County may or should furnish me with an office?

"2. If so then if no space is available in Court House or other County buildings could they rent or lease an office for me outside the County buildings?

"3. What is your opinion as to County furnishing me with telephone either in or out of Court House?

"4. What is your opinion as to County furnishing me with stationery and/or stamps to be used for official business?

"I would also like to have your opinion as to whether the County should furnish the Circuit Judge an office and/or telephone in the County where he lives and if so where."

The county solicitor of Pickens County was established and is operating under the authority of Act No. 46, H. 1060, approved September 13, 1935, (Local Acts, 1935, p. 266). From the provisions of this act the county solicitor is made subject to the general provisions of law applicable to other county solicitors of the state, except that he is elected by the voters of the county.

Your first and second inquiries are in regard to whether or not the county should furnish you, as county solicitor, with an office. This question has been many times put to us as the controlling statute from time to time has been changed. Such authority, if there be authority, would come within the provisions of Section 6755 of the Code of Alabama, 1923. A history of our interpretations in regard to this question is fully set out in an opinion to Hon. R. H. Williams under date of November 21, 1939. In order that this opinion may present a complete picture within itself of this question, permit me to quote in extenso from the opinion to Judge Williams.

"The remaining question for decision, therefore, is whether or not such suitable offices may be provided outside the courthouse, without regard to the availability of space in the courthouse, and, if so, whether or not such suitable offices must be located in the county site or sites or may be located elsewhere in the county.

"In an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of January 21, 1927, (Biennial Report of Attorney General, 1926-28, p. 67), it was held that there was no authority of law for a county paying the office rent of either a circuit judge or a circuit solicitor, resident in the county, where there was no suitable space for them in the courthouse. At the time of the rendition of that opinion, Section 6755, Subdivision (1) of the Code of Alabama, 1923, which is the section detailing the authority of the county governing body in such respect, appearing in this language:

"'6755. Authority of court.—The court has authority—

"1. To direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the different officers entitled to rooms therein, and to change the location of the courts, and the designa-

tion of rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon its minutes at a regular term of the court.'

"A short time later the above quoted subdivision of Section 6755 of the Code of Alabama, 1923, was amended by Act No. 75, H. 150, approved February 18, 1927 (General Acts, 1927, p. 57) to read as follows:

"1. To direct and control the property of the County as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, **including the circuit judge, if resident in the county**, and to change the location of the courts and the designation of the rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. **In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and to pay the rental from the county funds.**' (Emphasis supplied)

"The material changes made by the amendment are shown by the additions above indicated by emphasis. In an opinion to Hon. J. N. Mullins, Solicitor, Twentieth Judicial Circuit, Dothan, Alabama, under date of April 8, 1927 (Biennial Report of Attorney General, 1926-28, p. 159), this office again considered the question of whether or not there was any authority of law for a county governing body paying the office rent of a circuit solicitor or county solicitor, resident in the county, where the courthouse was inadequate to supply office rooms for such officers in the light of this amendment to Subdivision 1 of Section 6755, supra. Attention was called in that opinion to the fact that the amended statute provided for circuit judges, but was silent as to solicitors, both circuit and county. It was concluded that Subdivision 6755, as amended, supra, gave the county governing body of a county no authority to pay the office rent of a circuit solicitor or county solicitor in any event.

"Section 6755 has been subsequently amended, but in respects not here material, and, therefore, the subsequent amendments to said section will not be here considered.

"The holding of both opinions hereinabove referred to in so far as it pertains to solicitors, was reaffirmed in an opinion to Hon. W. C. Batson, Judge of Probate, Chambers County, LaFayette, Alabama, under date of May 25, 1939 (Biennial Report of Attorney General, 1930-32, p. 296). In my judgment, those opinions clearly stated the law on this subject and, for that reason, the subsequent opinion of this office to Hon. T. R. Martin, Judge of Probate, Bullock County, Union Springs, Alabama under date of June 17, 1932, (Biennial Report of Attorney General, 1930-32, p. 893) which reaches a different conclusion, being laid in error, is hereby expressly overruled. I think it advisable to point out that the 1931 amendment to Section 6755 referred to in the opinion to Judge Martin, did not alter, change or modify in any respect the provisions of Subdivision 1 thereof as it existed after the 1927 amendment thereto, supra.

"Thus, it can be seen that prior to Act No. 329, supra, there was no authority of law for the county of a circuit solicitor's residence to furnish suitable offices for him, the rent thereon to be paid by the county, at the county site or anywhere else in the county, even though the condition in the courthouse was such that there was no room for him to have suitable offices therein."

Act. No. 329 referred to in the above quotation is Act No. 329, H. 147, approved August 31, 1939. This act requires the county to furnish office space to the following: (1) Circuit solicitors; (2) deputy circuit solicitors elected by the people, a portion of whose salary is paid by the state; (3) all deputy circuit solicitors, a portion of whose salary is paid by the state and (4) all assistant deputy circuit solicitors, a portion of whose salary is paid by the state.

Therefore, it appears that the status of the county or deputy solicitors whose entire salary is paid by the county remain unchanged (see last paragraph in opinion to Hon. W. C. Hare, under date of October 18, 1939, a copy of which is enclosed), and there is no obligation upon the county to furnish such solicitors with an office.

Of course, under the general supervisory powers of the court of county commissioners, they may, if they see fit and if there is a surplus of office space in the county buildings, allow the county solicitor to occupy one of these offices, but there is no authority for the county to pay for such an office.

Your inquiry number three is in regard to the county furnishing you, as county solicitor, with a telephone. If your office is located (as above pointed out) in the courthouse, the commissioners' court may furnish you with a telephone. This specific question was answered in our opinion to Hon. George C. Johnson under date of November 21, 1939, wherein it was stated:

"Act No. 187, S. 199, approved April 19, 1933, General Acts, Extra Session, 1933, page 201, authorizes the board of revenue to furnish offices they designate in the courthouse with telephone. This Act has been held to be authority for furnishing the office of a county solicitor with a telephone. See opinion to Hon. Cecil H. Strawbridge, County Solicitor, Lamar County, under date of January 26, 1936, Quarterly Report of Attorney General, Vol II page 64."

Your inquiry number four is in regard to the county furnishing you, as county solicitor, with stationery and/or stamps to be used for official business. This office has held in opinions cited below that a county is not required to furnish a county solicitor with stationery, etc. Opinion to Hon. George Malone under date of August 11, 1928, Biennial Report of Attorney General, 1926-28, p. 695; opinion to Hon. Wm. G. Lindsey, under date of March 8, 1937, Quarterly Report of Attorney General, Vol. VI, p. 108; opinion to Hon. G. H. Howard under date of February 2, 1939, Quarterly Report of Attorney General, Vol. XIV, p. 156 and opinion to Hon. W. C. Hare under date of October 18, 1939, a copy of which is enclosed.

It will be noted from the opinion to Mr. Hare, supra, that this situation is not changed by the passage of Act No. 329, supra.

Your fifth inquiry is in regard to the duty of the county to furnish the circuit judge with an office and/or telephone in the county where he lives and, if so, where. Since this opinion in the main deals with the county solicitor, I refer you without comment to an opinion of this office to Hon. V. W. Elmore under date of November 23, 1929, a copy of which is enclosed, which specifically answers your inquiries in regard to the circuit judge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 7, 1940.

Hon. Walter W. Flowers,
Member, House of Representatives,
Butler County,
Greenville, Alabama.

Statutes—

Act No. 395, H. 730, approved September 13, 1939, relative to election of members of County Board of Education of Butler County, held inoperative.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for an official opinion dated December 20, 1939, which follows:

"During the recent session of the legislature a local bill was passed which sought to provide for the method of electing the members of the Butler County Board of Education. This act is described as House Bill No. 730, Gov. No. 395, and was approved September 13, 1939.

"In the case of *Kyle vs. Wiggins*, 20 Ala. App. 347, 102 So. 143, it was held that a statute similar to the one in question was unconstitutional, in that it contravened Sec. 104, sub-sec. 22 of the constitution of 1901. Although the act in question does not specifically provide for the establishment of separate school districts it does provide that one member of the County Board of Education shall 'be elected from each commissioner district and shall be a bona fide resident of the district from which he is elected.' The act further provides that one member of the Board shall be elected from the County at large.

"It is the purpose of this letter to request an opinion of the Attorney General upon the constitutionality of the local act described above."

I also have your amendment to the above request, which reads as follows:

"On December 20, 1939, I made the above styled request for an official opinion of your office on the constitutionality of a certain local act passed during the recent session of the legislature. The Act is described as House Bill No. 730, Gov. No. 395, approved September 13, 1939.

"I should like to amend my request and carry the same a point further: Assuming that the Act in question is within the bounds of the Constitution, will it be rendered inoperative because of the fact that the members of the Butler County Board of Education are elected on a staggered system, and no provision is made in the Act as to the time when the Board member from each district is to be elected?"

I perpermit any consideration of your first inquiry for the reason that, in my opinion, your second inquiry must be answered in the affirmative, because of the provisions of Act No. 220, S. 129, approved August 16, 1915, page 281, the pertinent parts of which have been codified as Section 89 of the Alabama School Code of 1927.

Under these provisions of law, the terms of the present incumbents of the office of member of the County Board of Education of Butler County, Alabama expire as follows:

The terms of the two members who were elected at the general election of 1934 will expire at the general election to be held in November, 1940.

The term of the member who was elected at the general election of 1936 will expire at the general election to be held in November, 1942.

The terms of the two members who were elected at the general election of 1938 will expire at the general election to be held in November, 1944.

The 1939 Act under consideration provides:

"Section 1. There shall be elected by the voters of the County five (5) members of the Butler County Board of Education. One member shall be elected from each Commissioners District and shall be a bona fide resident of the District from which he is elected. There shall be one member of the Board elected from the County at large, and may reside in any part of the County.

"Section 2. The present members of the Board of Education shall hold office until the expiration of their respective terms, and until their successors shall have been elected and qualified."

Section 1 of said Act provides for the election of five members of the County Board of Education of Butler County, no more than one of whom is allowed to be a resident of any one Commissioner's District, except that one member may reside anywhere within the county.

Section 2 provides that the incumbents in the office shall hold office until the expiration of their respective terms.

The provisions of the act are confused and unworkable. Consider the case of the election of successors to the two members of the present Board whose terms expire at the general election of 1940. It cannot be determined from the act, or from any other provision of law, whether the successors to these two present members are required to be bona fide residents of Commissioner's District No. 1, No. 2, No. 3, or No. 4 of the county, and whether either or both of them may be residents of any part of the county in which they choose to reside.

In my opinion, the 1939 act is wholly incomplete, unworkable, and, in my opinion, never can become operative. *State ex rel. Leslie v. Brackin, et al.*, 154 Ala. 151, 45 So. 841.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 9, 1940.

Hon. Frank Pearce,
Tax Assessor, Marion County,
Hamilton, Alabama.

Tax Assessors—Plat Book—

Court of County Commissioners authorized to pay for the making of a plat book at the time of its completion, under the authority of Section 60 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of December 23, 1939, in which you request my opinion as follows:

“Will you please give me your opinion and ruling on the following:

“The Tax Assessor of each county is required to make up a plat book for the acreage and a plat book for the city property for which the County Commissioners are required to pay a reasonable amount for making these books. Will you please advise me on what date the Tax Assessor is to receive his compensation for the making of these two books.

"In case the Tax Assessor has these books completed by the 3rd Monday of January will the compensation be due and payable at the time the books are completed?"

It is my opinion that the compensation due the Tax Assessor for making the plat books becomes due and payable upon the completion thereof.

Section 60, Act No. 194, H. 324, approved July 10, 1935, page 256 of the General Acts, Regular Session, 1935, at page 287, reads as follows:

"Section 60. The Tax Assessor shall make, or cause to be made, a complete plat book or books of all real estate in the county, unless such book or books have already been provided, in a form to be prescribed by the State Tax Commission, in which the name of the owner shall be entered on each separate subdivision, together with the assessed value thereof. The court of county commissioners or court of like jurisdiction shall pay out of the general fund of the county, for making out the plat books required by this and the preceding section, a reasonable compensation to the person performing said work, which debt shall be preferred claim against the county."

It will be noted from the above that the compensation to be allowed the tax assessor for making the plat books becomes a preferred claim which is to be paid in accordance with Section 231 of the Code of Alabama, 1923, as amended. Cf. Biennial Report of Attorney General, 1930-32, page 846.

Yours very truly,

THOMAS S. LAWSON,

Attorney General

February 9, 1940.

Hon. Joe Patton,
Tax Collector, Sumter County,
Livingston, Alabama.

Exemptions—Property owned by Presbyterian Church at Gainesville, Alabama, is not exempt from ad valorem taxation, although income from said property is used for charitable purposes, for the reason that the property is let for rent or hire (General Acts, 1935, p. 257).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 25, 1940, in which you request my opinion as follows:

"The Presbyterian Church at Gainesville, Alabama, own 141 acres of country real estate that was 'willed' to them by a member of their Church several years ago, this land is rented out yearly, and the revenue from such rents goes into the regular church treasury to defray the expenses of the church, so naturally they use this revenue in helping pay the Preacher, the upkeep of the church and such other expenses as other religious organizations have, in other words all of their revenue is used for religious and charitable purposes.

"In June, 1938, the Supreme Court held that all property owned by the Masonic Lodges whether revenue producing or not was exempt from ad valorem tax. Please advise me if this same ruling would not exempt the Church of the above referred to tax."

In my opinion, the described property of the Presbyterian Church at Gainesville, Alabama, would not be exempt from ad valorem taxation under the facts stated in your inquiry.

Your attention is directed to Act No. 194, H. 324, approved July 10, 1935, (General Acts, 1935, p. 257), which provides as pertinent, as follows:

"Section 2. * * * All property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, however, property, real or personal, owned by any educational, religious or charitable institution, society or corporation, let for rent or hire or for use of business purposes, **shall not be exempt from taxation, notwithstanding the income from such property shall be used exclusively for educational, religious or charitable purposes; * * ***" (Emphasis supplied)

It would, therefore, appear that inasmuch as the property of the church is let for rent or hire, it would not be exempt from taxation, notwithstanding the income from the property is used exclusively for religious purposes.

The opinion of the Supreme Court of Alabama in the case of **Ware Lodge etc. v. Harper**, 236 Ala. 334, 182 So. 59, holding Ware Lodge No. 435 exempt from ad valorem tax, is not here applicable. The pivotal point of that case is found in paragraph number three of the opinion (182 So. 63) wherein it is stated that the exemption from taxation in the charter of the corporation was a part of the contract between the corporation and the State, and, therefore, inviolate as a contractual obligation. It does not appear from your inquiry that the Presbyterian Church at Gainesville, Alabama, was granted a charter, containing such a contract, by the State of Alabama prior to the Constitution of 1868, as was the Masonic Lodge considered in the Ware Lodge case.

Cf. Quarterly Report of Attorney General, Vol. XII, page 137.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 9, 1940.

Hon. Travis H. Johnson,
Treasurer, Walker County,
Jasper, Alabama.

Uniform System of Accounting—Chief Examiner of Accounts—
County Treasurer—

Chief Examiner, Division of Public Accounts has authority to make such rules and regulations for a uniform system of accounting for the various county officials as he sees fit.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated January 23, 1940, which follows:

"Re: Treasurer Claiming credit for the payment of County Warrants.

"I am sending you a copy of the form of warrant used by the Board of revenue, Walker County and issued to Treasurer of said County. You will note that the back side of the original warrant carries authority for the First National Bank to pay, when presented properly endorsed, and charge same to the Treasurer's account.

"The Clerk for the Board of Revenue usually prepares the warrant, which is okehed by at least three members of the Board and signed by the Chairman, then it is given to me for approval and payment, and rather than keep cash in the office, I stamp the authorization for the bank to pay, the Clerk for the Board of Revenue registers or enters it on his books and gives it to the payee of said warrant. The payee presents it to the bank for payment, receives the money and I enter it on my books and claim credit for it the day that it is paid at the bank—By using this method I have claimed credit at the time that I actually part with the money or at the time that payment is made—I have been requested by Mr. Singleton's Department to claim credit on my books for the cash at the time that I stamp the authorization for the bank to pay, regardless of the time that the payment will be made. The payee may keep the warrant for a week, a month or a year before presenting it for payment after I have stamped the authorization for the local bank to pay. I have tried to make a clear picture of the procedure that is used here in this county so that you may understand the question.

"QUESTION—When should a County Treasurer claim credit on his books for cash paid out by him? Should it be when he stamps authority for a local bank to pay (as described above) or when it is presented for payment, payment is made, evidenced by the endorsed warrant being presented, and the bank exchanges (at the close of each day) the warrants that have been presented and cashed by them for treasurer's check."

Before proceeding with an answer to your inquiry, allow me to call your attention to Act No. 26, H. 49, approved February 8, 1935, page 43 of General Acts, 1935, which act is commonly referred to as "The Uniform System of Public Accounting Act," and reads in pertinent part as follows:

"Section 1. The State Comptroller, with the approval of the State Auditor and the Chief Examiner of Accounts, is hereby required to prepare as soon as practicable after the passage and approval of this act, such forms of bookkeeping and accounting books, records, reports and other blanks as may be necessary for installation of a uniform system of accounting and reporting in and for the county officers of this State wherein the officers thereof are charged with any duties of receiving and disbursing public funds and other funds, and to transmit to such officers copies of such forms."

This Act is very broad in its application, and I am of the opinion that under the provisions of this Act, the Comptroller, prior to the passage of the Department of Finance Act of 1939, had the power to establish such uniform system of accounting for county officials as he saw fit.

I call your attention to Section 11 of the Department of Finance Act of 1939, which section abolishes the office of State Comptroller and confers all of the powers and duties heretofore given to the Comptroller on the Director of Finance.

I quote the pertinent part of Section 5 of the Department of Finance Act of 1939:

"The general functions and duties of the Director of Finance shall be as follows: *** (15) To examine and audit the records and accounts of all State and county officers, bureaus, boards and commissions, institutions and departments, as now provided by law or which may hereafter be provided by law; and to prepare forms for a uniform system of State and County records and accounts as now provided by law."

Section 26 of the Department of Finance Act of 1939 confers upon the Director of Finance a right to assign to the various State Departments such functions and duties as he sees fit, which are conferred upon the Director of Finance by the Department of Finance Act.

I here set out a letter written by Mr. A. R. Forsyth, Director of Finance, to Mr. B. P. Singleton, Chief Examiner of Public Accounts, under date of May 4, 1939:

"Under the authority vested in me in the Department of Finance Act of 1939, I am assigning the following duties to the Division of Examiners of Public Accounts:

"To examine and audit the records and accounts of all State and County officers, bureaus, boards, commissions, institutions and departments as now provided by law or which may hereafter be provided by law; and to prepare forms for a uniform system of state and county records and accounts as now provided by law. (Par. 15, Section 5, Department of Finance Act of 1939).

"Also, such authority necessary in the performance of your official duties, for the purpose of examination, as is provided the Director of Finance in Section 20 of the Department of Finance Act of 1939."

You are, therefore, advised that in my opinion the Chief Examiner, Division of Examiners of Public Accounts, has the right and authority to make and promulgate such rules and regulations for a uniform system of accounting for county officials, as he sees fit.

You are further advised that in my opinion, the Chief Examiner, Division of Examiners of Public Accounts, namely, Mr. B. P. Singleton, has the right and authority to require you, as Treasurer of Walker County, Alabama, to claim credit on your books for the warrants at the time you stamp the authorization for the bank to pay such warrants, regardless of the time that the warrants will be actually paid by the bank.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 10, 1940.

Hon. F. B. Pratt,
Superintendent of Education,
Bibb County,
Centerville, Alabama.

Schools—Bibb County—Mileage and Traveling Expenses Act relative to County Superintendent of Education construed (Act No. 384, H. 630, approved September 13, 1939, Local Acts, 1939, page 251, Pamphlet).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 9, 1940, in which you request my opinion as follows:

"Please refer to Act No. 384, H. 630, approved September 13, 1939, (Local Acts, 1939, page 251, Pamphlet) and advise me as follows:

"1. What is the meaning of the words 'calendar year' as used in said act? In other words, does the calendar year run from January 1 to December 31, and is that the period of time that the maximum amount can be collected in any one year under the terms of the bill?

"2. Since the bill states that this money should be paid in monthly installments, are those monthly installments required to be in equal amounts, and if not, what does control the amount of the monthly installments?"

"3. What is the maximum amount that I would be entitled to under the terms of the bill from the date of its approval by the Governor until the 31 day of December, 1939? In other words, if the calendar year is construed to mean from January 1 to December 31 of any one year, should the amount collected by me under the bill for the period of time subsequent to the approval of the bill be proportioned in its relationship to \$1000 for that calendar year?"

"4. Is it necessary that the claims for mileage traveled, when presented to the Custodian, be certified to?"

Section 1 of the Act referred to in your letter provides as follows:

"Section 1. The Superintendent of Education of Bibb County, Alabama, shall be allowed five cents for each mile traveled by him within the State of Alabama in the discharge of his official duties as such Superintendent of Education. The mileage and traveling expenses hereby allowed shall not exceed the sum of One Thousand Dollars in any calendar year, and the same shall be paid out of the County School Funds of Bibb County, Alabama, on warrants drawn by the Custodian of the County School Funds of Bibb County, Alabama, in monthly installments. For the purpose of determining the amount of each monthly installment herein provided for, the said Superintendent of Education shall execute and deliver, during the first week of each month, to the Custodian of the County School Fund of Bibb County, Alabama, his account showing the number of miles traveled by him during the calendar month next preceding that date in the discharge of his official duties."

In answer to your first inquiry, I am of the opinion that the words "any calendar year" as used in said act mean from January 1 to December 31, inclusive, of any one year. "Calendar year" ordinarily and in common acceptance means three hundred and sixty-five days, save Leap Year, from January 1 to December 1, inclusive. 62 *Corpus Juris* 964. It, therefore, follows that the maximum allowance for mileage and traveling expenses allowed the County Superintendent of Education of Bibb County is \$1000 in any calendar year, as above defined.

In answer to your second inquiry, it is my opinion that the allowance in question need not necessarily be paid in equal monthly installments. The reference to monthly installments in said act merely provides a mode of payment rather than the amount payable each month.

In answer to your third inquiry, it is my opinion that the maximum allowance that the County Superintendent of Education of Bibb County can collect, under the act, from September 13, 1939 (the date of its approval) to December 31, 1939, would be the proportionate part of the said \$1000 in relationship to the number of days in the year 1939 from September 13 to December 31, inclusive, as same bears to the number of days in that year.

Since the act in question did not become effective until September 13, 1939, it necessarily follows that the maximum allowance for the remaining part of that calendar year (1939) should be prorated.

I am of the opinion that your fourth inquiry should be answered in the negative. The act does not make it mandatory that the claim for mileage and traveling expenses be certified to. However, proper evidence should be presented showing that the mileage was actually traveled before you would be entitled to reimbursement, as provided for in the act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 10, 1940.

Hon. J. D. Sexton,
Clerk, Circuit Court,
Marion County,
Hamilton, Alabama.

Elections—

1. Election officials appointed by appointing board, composed of judge of probate, sheriff and clerk of the circuit court.

2. If any or all of said officers are disqualified by reason of being candidates in the election, the register of the circuit court shall appoint a qualified elector to take the place of each member of the appointing board who is disqualified.

3. When there is no register of the circuit court or he is disqualified to act, qualified electors to serve in the places of the members who are disqualified are appointed by the governor.

4. In a primary election, if the county executive committee of the party submits a list of names to the appointing board for appointment as officers to conduct the primary election, the appointing board "shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election" from the list so presented to it.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 3, 1940, in which you request my opinion as follows:

"Where the Judge of Probate and the Clerk of Circuit Court are candidates for office in the Election on May the 7th, 1940, who will appoint the Managers, Clerks and returning officer to hold the said Election?

"Please give Section and code where the same is found.

The appointment of election officials is governed by Article 7 of Chapter 19 (Sections 437-443) of the Code of Alabama, 1923. The appointing board normally consists of the judge of probate, sheriff, and clerk of the circuit court. Section 437, Code of Alabama, 1923. If any or all of said officers are candidates for election to any office at any election, such officers may not serve on the appointing board, and the judge of probate shall certify to the register of the circuit court the fact of the candidacy of any member of the appointing board. Section 439, Code of Alabama, 1923. Thereupon, the register of the circuit court shall forthwith and without delay appoint a qualified elector to take the place of each member of the appointing board who is a candidate for election and shall cause the elector so appointed to be informed of his appointment, but no person shall be appointed who is a candidate for any office to be voted for in that election. Section 440, Code of Alabama, 1923. When there is no register of the circuit court or he is disqualified from any cause to perform his duties under Section 440, supra, the judge of probate shall certify the fact of the candidacy of any of the officers normally constituting the appointing board to the governor who shall forthwith appoint a qualified elector to act in the place of each of said officers who is a candidate for election. Section 441 of the Code of Alabama, 1923.

The above cited statutory provisions are part of the laws of the state governing general elections, but by the provisions of Section 4 of Act No. 56, H. 73, approved February 25, 1931, (General Acts, 1931, p. 73), commonly referred to as the 1931 Primary Act, they are made applicable to primary elections.

However, by Act No. 575, H. 647, approved September 21, 1939 (General Acts, 1939, p. 929, Section 13 of the 1931 Primary Act was amended to read as follows:

"Section 13. Each candidate for nomination may at least twenty-five days before the primary, present to the County executive committee of his party a list of election officers desired by him for any one or more of the districts, wards or precincts; and his county committee shall, so far as practicable, make up, from the list so presented to it, a list of names of election officers, six in number, for each district, ward or precinct, which it will nominate to the appointing board of the County for appointment as officers to conduct the primary election and the County Committee shall present the list so made up by it to the appointing board of the county, which appoints the election officers to conduct elections for state and County officers in November, or at any other lawful time, which appointing board from the list so presented to it by the County Committee shall if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election, observing the above rule as to representation wherever more than one party enters the primary and in the latter case if a county committee has not given a sufficient number of names for a box, then

the appointing board shall supply the deficiency from the electors of that party. In the event the persons selected as officers fail to appear at the polling place by eight o'clock A. M. on the day of the primary election, then their places shall be filled by such of those who have been named by such appointing board, as do appear; and in the event none so named appear by eight o'clock A. M. then the voters present qualified to participate in such primary election may, from among themselves, select officers to conduct such election in such district or precinct, and such substituted persons, shall have the authority to conduct such elections, and to be paid for their services in the same manner as if they had been ordinarily appointed. All officers, serving in such primary elections shall take the same oath required to be taken by officers of regular state elections, which oath may be administered by any person authorized by law to administer oaths, or by any one of the inspectors. The officers of all primary elections held under provisions of this Act shall have the same power and privileges as officers of regular State elections, and shall be subject to the same restrictions, limitations, penalties and conditions." (Emphasis supplied)

Thus, it may be seen from the provisions of said section, as amended, and especially the underscored portion thereof, that when the county executive committee of the party submits to the appointing board a list of names of election officers for the primary election, the appointing board 'from the list so presented to it by the county committee **shall** if there be on said list the names of sufficient persons who are legally eligible select and appoint the officers to conduct the primary election.'

As I construe Section 13, as amended, supra, if the list of election officers submitted to the appointing board by the county executive committee of the party contains the names of sufficient persons who are legally eligible, then the appointing board **must** select and appoint the officers to conduct the primary election from such list.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1940.

Hon. S. L. Johnson,
Clerk, Circuit Court,
Calhoun County,
Anniston, Alabama.

Where a defendant is convicted and placed on probation and given time in which to pay the costs of the case, no executions can issue against the defendant for such costs as long as the probation remains in effect.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 6, 1940, in which you request my opinion as follows:

"The new probation law presents some new angles and questions in the matter of settling the fines and costs in cases where the defendants are put on probation:

"For instance; if the defendant is fined for any sum and he applies for and is granted probation and is ordered to pay all or part of the costs, either cash or part cash and balance in thirty, sixty or ninety days, and he does, or does not pay all costs or part of same, must the clerk issue execution for the fine and for the costs not paid cash, or must execution be issued, if any, at the end of the time allowed the defendant to pay and he does not?"

In answer to your request, it is my opinion that no execution could issue for costs where a defendant is placed on probation and given a stated length of time to pay such costs and the time designated by the court having not expired, as such probation is in effect a stay of execution for this length of time. Of course, if the court requires part of the costs paid in cash and the balance at stated times until it is all paid and the defendant fails to make the cash payment or fails to meet the deferred payments, then the court could revoke the order of probation and proceed to sentence the defendant to hard labor to pay the same, at which time execution can issue against the defendant for costs.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1940.

Hon. P. W. Lett,
Superintendent of Education,
Dale County,
Ozark, Alabama.

Dale County—County Superintendent of Education—

Qualifications—

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of January 25, 1940 which reads as follows:

"Re: Qualifications of Candidates for Superintendent of Education of Dale County.

"Will you please clarify Section 139 of Alabama School Code, 1937 as applied to Dale County, giving your ruling on the following questions:

1. Must the candidate's teaching experience comprise the three years next preceding his election?

"2. Is an ex-superintendent of Education who has been out of office and out of the teaching profession for three years or more eligible for the candidacy to this office?

"Your ruling will set this question in the clear for this county and be much appreciated."

Section 139 of the School Code of 1937 reads as follows:

"Section 139. Qualifications of County Superintendent.—No person shall be eligible for appointment by any County Board of Education or for political party nomination or for election to the office of County Superintendent of Education of any County, who does not as now required hold an Alabama certificate in administration and supervision based as a minimum upon graduation from a standard normal school or equivalent education, with at least one year of additional study of college grade and proof of three years of successful teaching experience next preceding his appointment; provided that the provisions of this section shall not apply to County Superintendents of Education in office on October 1, 1923. A County Superintendent of Education need not be a qualified elector of the County in which he serves."

It will be noted from the above section that one of the qualifications for a County Superintendent of Education is "three years" of successful teaching experience next preceding his appointment. The language used in this section is so clear and unambiguous that it admits of only one construction; that is, that the three years teaching experience must actually be three years next preceding the appointment.

Your first question, therefore, should be, in my opinion answered in the affirmative.

For the reason stated above, your second question should also be answered in the affirmative. There is, however, one exception to the above rule. This exception is: Where a County Superintendent of Education is a candidate to succeed himself, the three years next preceding his appointment, for to so hold, would prohibit a County Superintendent of Education from succeeding himself. Quarterly Report, Attorney General, Vol. II, page 180.

The above is based on the general law of the State applicable to appointment of County Superintendent of Education.

However, your attention is called to Act No. 127, H. 239, approved January 27, 1927 (Local Acts, 1927, page 52). Section 4 of this Act prescribes the qualifications for the County Superintendent of Education of Dale County and reads as follows:

"Section 4. That said County Superintendent shall be charged with the same duties and shall exercise the same powers as are now or as may hereafter be provided by the General School Laws of the State of Alabama, in the conduct of the office of county Superintendent of Education; and no person shall be eligible for political party nomination, or for election to the office of County Superintendent of Education of Dale County who does not hold an Alabama certificate in administration and supervision based as a minimum upon graduation from a standard Normal School, or equivalent education with at least one year of additional study of college grade, and proof of three years of successful teaching experience and such other additional qualifications as may be provided by the General School Laws of the State. Provided, however, that if no person meeting these requirements qualifies for election as provided in this Act the County Board of Education shall appoint a Superintendent of Education as provided by the General Law regulating the appointment of Superintendent; and provided that no person shall be eligible to qualify or be elected to the office of County Superintendent of Education of Dale County who is not a qualified elector of the State of Alabama at the time of the nomination or election to such office and who does not procure from the Superintendent of Education of the State of Alabama, a certificate that he possesses the qualifications prescribed by this Section. The certificate shall be filed with the Probate Judge of Dale County before his name shall be printed upon the official ballot."

Under the provisions of the above quoted section, any person is eligible as a candidate for the office of Superintendent of Education of Dale County who has the following qualifications.

1. That he is a qualified elector of the State of Alabama at the time of his nomination or election.
2. That he holds an Alabama certificate in administration and supervision based as a minimum upon graduation from a standard Normal School or equivalent education with at least one year of additional study of college grade.
3. Proof of three years successful teaching experience. It is to be noted that the Local Act, *supra*, does not require the teaching experience to be immediately prior to date of appointment.

For a full and complete discussion of the qualifications of the County Superintendent of Education of your county, you are respectfully referred to an opinion of this office under date of March 4, 1936, addressed to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, found on page 265.

of Volume II of the Quarterly Reports of the Attorney General, which opinion deals specifically with the questions contained in your request.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 12, 1940.

Hon. Cecil S. Jones,
Tax Assessor,
Escambia County,
Brewton, Alabama.

Taxation—Assessment for current year's taxes of property redeemed from State or where certificate of purchase is assigned by State—

1. Property redeemed from State should be assessed for current year's taxes by the Tax Assessor, pursuant to the provisions of Section 277 of the 1935 Revenue Act, and without any penalty whatever, regardless of time when redeemed.

2. Such property, if not assessed during current tax year, subject to assessment thereafter as an escape, and the penalty for an escape, under the provisions of Section 45 of the 1935 Revenue Act.

3. Where State's certificate of purchase is assigned to third party, property should be assessed by the Tax Assessor for current year's taxes, under the provisions of Section 283 of the 1935 Revenue Act, regardless of the time of such assignment.

4. Such property, if not assessed during current tax year, subject to assessment thereafter as an escape, and the penalty for an escape, under the provisions of Section 45 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter in which you request my opinion as follows:

"Please refer to opinion of the Attorney General of Alabama, Biennial Report 1934-36, page 778. In further reference to that opinion I would like to ask questions.

"1. On lands redeemed after October 1, and on or before the third Monday in January, following, when should the property be assessed, by whom should it be assessed, and when would the assessment become subject to 10% penalty?

"2. On lands redeemed after the third Monday in January, and on or before Sept. 30, following, when should the property be assessed, by whom should it be assessed, and when would the assessment become subject to 10% penalty?

"3. Specifically, in case the tax payer fails or refuses to make the return on lands redeemed when should the Assessor assess the property and when and under what circumstances would the assessment become subject to 10% penalty?

"4. In case the State assigns certificates to individuals when would a 10% penalty become effective on such assessments?"

Your first three questions, all dealing with the assessment of property redeemed from the State for current year's taxes, are so interrelated that a seriatim treatment of the same is not necessary, and they will be here considered together.

Since the time for making application for redemption of property on the installment plan provided by Section 291 of the 1935 Revenue Act, by said section, as amended by Act No. 49, H. 25, approved March 25, 1936 (General Acts, 1936, p. 27), and by Act No. 81, H. 259, approved February 3, 1937, (General Acts, 1936-37, p. 91) has expired, it is only necessary to consider the questions propounded in your inquiry as to redemptions made in the regular manner, i. e., pursuant to the provisions of Section 269 of the 1935 Revenue Act, as last amended by Act No. 55, H. 24, approved March 26, 1936 (General Acts, 1936, p. 30). Consequently, no special provisions in regard to the assessment of property for current year's taxes redeemed under the provisions of our statutes, *supra*, in regard to installment redemptions, need be here considered.

Section 277 of the 1935 Revenue Act provides as follows:

"Section 277. Within five days from the redemption of any real estate bid in by the State, the judge of probate shall notify the tax assessor and tax collector of his county thereof, and shall on demand, pay to them the costs and fees to which they are respectively entitled; and the assessor shall enter such real estate, and the name of the person redeeming the same, on an appropriate list to be kept by him for assessment."

In the opinion to which you refer in your letter of inquiry, speaking of Section 277, *supra*, it was stated:

"I think it is reasonably certain that this contemplates that the tax assessor assess the property for the current assessment year."

Consequently, in my opinion, pursuant to the provisions of Section 277, supra, the Tax Assessor should assess property redeemed from the State for the current assessment year immediately upon being notified by the Judge of Probate of such redemption, which notification should be within five days thereof, regardless of the time during the tax year when the same is redeemed. When he so assesses such property, in my opinion he may not charge the 10% penalty provided by Section 44 of the 1935 Revenue Act, regardless of the time during the current tax year when the assessment is made for the reason that said section and the penalty there provided for only applies to the property which the taxpayer owned on October 1st and which he was required to return for assessment by Section 30 of the 1935 Revenue Act. As to property redeemed from the State during the current tax year, the title to the same on October 1st was in the State, and the taxpayer is under no duty to return the same for assessment for the current year's taxes. The taxpayer being under no duty to return property redeemed for assessment during the current tax year, it is my judgment that no penalty may be placed upon him when the same is assessed by the Tax Assessor during the current tax year pursuant to the provisions of Section 277, supra.

On the other hand, if for any reason such property is not assessed for taxation during the current tax year, thereafter the same becomes subject to assessment for that year as an escape, pursuant to the provisions of Section 45 of the 1935 Revenue Act, and the penalty of 10% on an escape provided by said section. It seems to be a harsh rule that results in the imposition of a penalty upon a taxpayer because his property was not assessed for taxation when he is under no duty to return it for assessment and when the reason for its not being assessed is because of the failure of the Tax Assessor (whose failure in turn might be due to the failure of the Probate Judge to notify him of the redemption), but the taxpayer may avoid this penalty by returning the property which he redeems from the State for taxation during the current tax year, or making certain that the Tax Assessor assesses the same during the tax year, pursuant to the provisions of Section 277, supra.

Recapitulating, it is my opinion that when property is redeemed from the State, the Tax Assessor should assess the same for the current year's taxes pursuant to the provisions of Section 277, supra, without the imposition of any penalty whatever, regardless of the time during the current tax year when the same is redeemed; that if he does not do so, the taxpayer may return the same for assessment for taxation during the current tax year at any time during the current tax year without being subjected to any penalty whatsoever; but that if the property is not assessed for the current year's taxes during the current tax year for any reason whatsoever, it thereafter becomes subject to assessment as an escape, and subject to the penalty on an escape.

In regard to your fourth question, I presume that you have reference to assignment of certificates of purchase, where the State was the purchaser at the tax sale, pursuant to the provisions of Section 235 of the 1935 Revenue Act which reads:

"Section 235. The certificate of purchase delivered by the Tax Collector to the purchaser at such sale or to the State in case the State is the purchaser, is assignable in writing or by endorsement, and if the State is the purchaser such assignment shall be made by the State Land Commissioner upon the payment of the amount bid by the State, with

interest thereon at the rate of six per cent per annum from the date of sale to the date of assignment, plus all taxes due on said lands since the date of sale, with interest thereon at six per cent from date of maturity. Such assignment shall vest in the assignee and his legal representatives all the right and title of the original purchaser, or of the State in case the State is a purchaser."

As to property transferred to a third party under such an assignment, I know of no statute imposing a duty upon the party to whom the same is so transferred to return the same for assessment for taxation for the current tax year, but it would seem that the same should be assessed for taxation for the current tax year by the Tax Assessor, pursuant to the provisions of Section 283 of the 1935 Revenue Act, which reads:

"Section 283. Upon the consummation of such sale the State Land Commissioner must certify the same to the judge of probate, who shall make entry thereof in the book of land sales in his office; and the Commissioner shall furnish a description of such lands to the assessor of the county in which they are situated, who shall enter the same upon his list of assessment; but the time allowed infants and lunatics in which to redeem lands sold for taxes, shall in no wise be affected by any such sale and conveyance."

While, strictly speaking, this section seems to apply only to sales by the State of property which it has purchased at tax sales after the period of redemption has expired, in my opinion, it would also include property transferred to a third party pursuant to the assignment or sale of the certificate of purchase by the State under the provisions of Section 235, supra, especially in view of the fact that there is no other statutory provision for the assessment of such property for taxation for the current tax year. A sale or assignment of the certificate of purchase differs from a sale after the period of redemption has expired, only in that in the former the vendee takes subject to the right of redemption. I might state here that I am advised that the State Land Commissioner has always construed Section 283, supra, to apply to sales or assignments under Section 235, supra. Consequently, in my opinion, pursuant to the provisions of Section 283, supra, the Tax Assessor should assess property where the State's certificate of purchase is sold or assigned to a third party for the current assessment year immediately upon being notified by the State Land Commissioner of such sale or assignment, regardless of the time during the tax year when the same is sold or assigned. When he so assesses such property, in my opinion he may not charge the 10% penalty provided by Section 44 of the 1935 Revenue Act, regardless of the time during the tax year when the assessment is made for the reason that said section and the penalty there provided for only applies to the property which the taxpayer owned on October 1st and which he was required to return for assessment by Section 30 of the 1935 Revenue Act. As to property where the State's certificate of purchase is sold or assigned to a third party during the current tax year, the title to the same on October 1st was in the State, and the taxpayer is under no duty to return the same for assessment. The taxpayer being under no duty to return such property for assessment during the current tax year, it is my judgment that no penalty may be placed upon him when the same is assessed by the Tax Assessor during the current tax year pursuant to the provisions of Section 283, supra.

On the other hand, if for any reason such property is not assessed for taxation during the current tax year, then the same becomes subject to assessment for that year as an escape, pursuant to the provisions of Section 45 of the 1935 Revenue Act, and the penalty of 10% on an escape provided by said section. It seems to be a harsh rule that results in the imposition of a penalty upon a taxpayer because his property was not returned for taxation when he is under no duty to return it for assessment and when the reason for its not being assessed is because of the failure of the Tax Assessor (whose failure in turn might be due to the failure of the State Land Commissioner to notify him of a sale or assignment), but the taxpayer may avoid this penalty by returning the property which is so transferred to him for taxation during the current tax year, or making certain that the Tax Assessor assesses the same during the tax year, pursuant to the provisions of Section 283, *supra*.

Recapitulating, it is my opinion that when property is transferred to a third party pursuant to a sale or assignment of the State's certificate of purchase, the Tax Assessor should assess the same for current year's taxes pursuant to the provisions of Section 283, *supra*, without the imposition of any penalty whatever, regardless of the time during the current tax year when the same is so transferred; that if he does not do so, the taxpayer may return the same for assessment for taxation during the current tax year at any time during the current tax year without being subjected to any penalty whatsoever; but that if the property is not assessed for the current year's taxes during the current tax year for any reason whatsoever, it thereafter becomes subject to assessment as an escape, and subject to the penalty on an escape.

I trust that the above clarifies the holdings of the opinion to Hon. Harry M. Touart, Tax Assessor, Mobile County, Mobile, Alabama, under date of August 14, 1936, Quarterly Report of Attorney General, Vol. IV, p. 124, Biennial Report of Attorney General, 1934-36, p. 778, referred to in your letter of inquiry.

The conclusion of the opinion rendered to Hon. J. E. McAdory, Deputy Tax Assessor, Jefferson County, Birmingham, Alabama, under date of May 22, 1937, Quarterly Report of Attorney General, Vol. VII, p. 161, Biennial Report of Attorney General, 1936-38, p. 243, is in accordance with the conclusions hereinabove reached as to the assessment of property which has been transferred to a third party pursuant to the assignment of the State's certificate of purchase for taxation for the current tax year, but the reasoning and authorities therein given in support of said conclusion are hereby expressly repudiated in favor of the reasoning and authorities hereinabove given for the conclusions here reached on this question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1940.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Taxation—Tax Sales—

In a tax sale advertisement given by the tax collector under Section 224 of the Revenue Act of 1935, it is not necessary to use the word "fees" following name of owner and description of property as "Tax, fees and costs \$ _____." In this respect said advertisement should be as follows: "Taxes and costs \$ _____."

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 22, 1939, in which you request my opinion as follows:

"I shall appreciate you giving your opinion as to whether or not the word 'fee' used in the tax sale advertisement; viz. 'tax fees and costs, _____ dollars' is necessary to make the advertisement of a piece of property for sale complete.

"If your opinion is in the affirmative, then, is not a charge of the rate per word fixed by law a proper one against the delinquent taxpayer? Section 227 of House Bill 324—1935 Legislative session specifically states that the Probate Judge, among other things, shall keep in separate columns the amounts, the kind of tax penalties **and of the fees and costs** in each case. Does the accrued fees become an item within itself rather than to be classed as costs? The costs in the case, I take it, is the newspaper charge for running the advertisement.

"The Probate Judge, in issuing his decree of sale, decrees that the State of Alabama has a lien for the payment of taxes and an additional sum for fees, charges and costs. He further decrees that the Tax Collector shall sell property for payment of delinquent taxes, and of said fees, charges and costs.

"Considering the premises, it appears to me that the Tax Collector would have no authority to include the accrued fees in the tax sale unless they were included in the Probate Judge's decree and also set out in the amount for which delinquent property was advertised for sale."

Your first and main inquiry involves a construction of Section 224 of the Revenue Act of 1935, which is as follows:

"Section 224. Immediately at the end of any term of court at which any decree for sales of real estate for the payment of taxes are rendered, or as soon thereafter as practicable, the tax collector shall proceed to enforce such decree by sales of real estate ordered to be sold, and to this end shall give notice for thirty days before the day of sale, by publication for three successive weeks in some newspaper published in the county, or at least three (3) weeks before the day of sale shall post a notice at the courthouse of his county, and at some public place in the precinct in which the real estate is situated, that at the time specified therein, he will proceed to sell such real estate separately, describing such portions as are embraced in each decree, **and stating the amount for which each decree was rendered (without stating the items of which said decree is composed)** and the person against whom the taxes embraced in such decree were assessed, or if assessed to 'Owner unknown', stating that fact. The rate to be charged for publishing such notice in a newspaper shall not exceed one and one-half cents per word for the first insertion, and one cent per word for each subsequent insertion; but no allowance shall be made for the publication of any matter other than is required by law; and if no newspaper is published in the county, or if the publication of the notice cannot be had in the county at the above rate, the posting of such notice at the courthouse, and at a public place in the precinct in which the real estate is situated, as required by this section, shall be sufficient notice of such sale." (Emphasis supplied)

The notice required by said section must be given in strict conformity therewith. **Biennial Report of Attorney General, 1934-36, page 793.** The pertinent question then presents itself as to what is a proper interpretation of **the following part of said section:**

"* * * and stating the amount for which each decree was rendered (without stating the items of which said decree is composed) * * *

By placing a strict interpretation on the words "(without stating the items of which said decree is composed)", it well may be argued that the notice in this respect should contain only one figure as \$ _____, viz., the amount for which the decree was rendered. However, by an administrative construction in general of many years standing a broader interpretation has been placed upon the above quoted portion of said section set out in parentheses. Said administrative ruling did not limit this portion of the notice to one figure, the amount for which the decree was rendered, but allowed four words, viz., "Tax and cost \$ _____". (This is evidenced by the forms sent by the State to tax collectors for several administrations.) The reason for this interpretation was that the words "(without stating the items of which said decree was composed)" were construed to mean that a detailed itemization was not required, and also that such notice in this respect was not limited to only one figure as \$ _____, the amount for which the decree was rendered. It was reasoned that a prospective purchaser at a tax sale should be apprised of the total amount necessary to make a purchase including the amount of the taxes plus whatever other expenses that may have accrued. These other expenses were designated as "costs", which term to the average layman would not be confusing. Since the general public is not aware of the technical legal distinction between costs, fees, charges, penalties, etc., it was reasonable to designate all items of expenses connected with a tax sale, other than taxes, as "costs".

It is true that other sections of the Revenue Act of 1935 dealing with tax sales refer separately to costs, fees, charges, expenses of sale, etc. (See Sections 223, 227, 228, 230, 231, 232, of the Revenue Act of 1935). However, none of them refer to the notice given by the tax collector under Section 224, *supra*, and only lead to confusion as to what is meant by that portion of Section 224 above discussed.

It will here be noted that the provisions of law relative to tax sales in the Revenue Act of 1935 are substantially the same as those found in the revenue acts of many years past.

While not controlling, an administrative construction of a statute, the application and meaning of which is doubtful, is entitled to great weight and consideration, especially if it has prevailed for a considerable time.—**State v. Tuscaloosa Building & Loan Association**, 230 Ala. 476, 161 So. 530; **State ex rel Fowler v. Stone**, 237 Ala. 78, 185 So. 404; **Waters v. State**, 25 Ala. App. 144, 142 So. 113.

Since the meaning of the statute under consideration is confusing and of doubtful meaning, the rule above set out is clearly applicable. In view of the administrative construction of such long standing of said statute, it is my opinion that said interpretation should prevail, and I am unwilling to overturn same.

What has been said above is applicable generally. However, the records in the office of the State Comptroller show that, as far as Jefferson County is concerned, in the past payment has been allowed repeatedly for "Tax, fees and costs \$.....", as advertised. This being true, I do not think you should be bound by the administrative ruling in general. Therefore, in my opinion, payment should now be allowed for the words actually published, viz., "Tax, fees and costs \$....." in past transactions. However, in the future you should follow the general rule as above set out.

The premises considered, it therefore follows that generally your first inquiry should be answered in the negative and renders answers to your other inquiries unnecessary. However, as above stated, payment should be made for the words actually published, viz., "Tax, fees and costs \$.....", in past transactions in Jefferson County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1940.

Hon. H. M. Hughes,
Clerk, Circuit Court,
Madison County,
Huntsville, Alabama.

Clerks of Circuit Court—Final Record—

The final record in a case where defendant pleads guilty without indictment under Act No. 227, H. 417, approved August 16, 1939, would include the notice to the court of a desire to enter a plea of guilty by the defendant, the information filed by the solicitor charging the offense, every pleading, order and judgment of the court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 3, 1940, in which you request my opinion as follows:

"Please advise us 'what constitutes a Final Record of a case in which an information is filed; and the defendant pleads guilty, without waiting to be indicted by the Grand Jury.'"

Your inquiry has caused me to contact the Department of Corrections and Institutions and I find that they have, with the consent of the clerks of the State, adopted a departmental ruling whereby they pay \$3.00 for the making of a final record in only those criminal cases begun by indictment and where a trial is held. If this rule be binding, then of course, there would be no method by which a clerk may receive payment for making a final record where a criminal case is disposed of under the provisions of Act No. 227, H. 417, approved August 16, 1939, in view of the fact that such cases are begun by information filed by the solicitor and the defendant pleads guilty.

I know of no provision of law, however, which authorizes the payment to a clerk of a flat sum of \$3.00 for making final record in criminal cases, nor do I know of any provision of law which limits the right of a clerk to collect for the making of a final record to only those criminal cases begun by indictment and where the defendant is subsequently tried.

Section 3729, Code of Alabama, 1923, as amended, provides for the payment to the clerk of fifteen cents for each one hundred words in the final record.

I am, therefore, of the opinion that a clerk of a circuit court is entitled to receive the sum of fifteen cents per hundred words for making final record in cases disposed of under the provisions of Act No. 227, H. 417, approved August 16, 1939.

It is practically impossible to state in the abstract as to what the final record shall contain. The contents of the final record naturally depend on what is done in the court proceedings in each case. In general terms, the final record should contain every pleading and order and judgment and similar matters. Biennial Report of Attorney General, 1928-30, page 558.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 12, 1940.

Hon. H. C. Blakemore,
Sheriff, Madison County,
Huntsville, Alabama.

Sunday Violations—There is nothing in the Alabama Beverage Control Act or other law of Alabama which prohibits the retailing of beer or whiskey on Sunday by cafes and hotels who have a license to sell such beverages.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 17, 1939, in which you request my opinion as follows:

“As Sheriff of Madison County, Alabama, I hereby request formal opinion of you on the following questions:

“Is it legal for a dance hall to operate on Sunday in Alabama where a license has been paid for same and where nickelodeon electric music machines are used to produce music by the insertion of a coin, and where said dance hall is conducted with or without having paid a license for a dance hall and whether a cafe is operated in conjunction with said dance hall or not?

“Is there any authority under the A. B. C. Act to prohibit the retail sale of beer or whiskey on Sunday by a cafe or hotel where license has been paid for the sale of same?”

In answer to your first inquiry, I am enclosing copy of the opinion of this office written January 25, 1940, to Hon. Jeff D. Smith, Solicitor, 23rd Judicial Circuit, Huntsville, Alabama. This opinion deals with the identical question you propound here and answers the same fully.

In answer to your second inquiry, there is nothing in the Alabama Beverage Control Act or other State law which I can find that prohibits the retailing of beer or whiskey on Sunday by cafes and hotels who have a license to sell such beverages.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 12, 1940.

Hon. G. W. Cuninghame,
Register, Circuit Court,
Marengo County,
Linden, Alabama.

Service of Process—In suits in equity on insane persons—

1. Service of process in a suit in equity upon a person of unsound mind who is confined in an insane hospital is complete when the summons is served upon his guardian, with or without service upon the person, as the court may direct.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of January 15, 1940, in which you request my opinion as follows:

"I am writing to ask you to give me your construction of the law with reference to persons confined in insane hospital and how service should be had. I refer you to Section 9438 Code of 1923, and also to the new law beginning Jan. 1, 1940. I am not clear as to how service is to be perfected. Should copy of Complaint together with a Summons be addressed and sent by Registered mail to the party of unsound mind or be addressed to the Supt. of the Hospital where confined? I understand that it is necessary to have the certificate from the Supt., but what I wish to know is the certificate all that is necessary or should I proceed in addition to securing the affidavit to issue summons and send copy, and if so to whom should it be sent?"

In your inquiry you refer us to Section 9438 of the Code of Alabama, 1923, and also "to the new law beginning January 1, 1940." I assume that you refer here to the new Alabama Equity Rules which were adopted by a resolution of the Supreme Court on October 9, 1939, to become effective January 1, 1940, 191 So. (No. 5 Advance Sheets, p. XXV).

In the Alabama Equity Rules, recently set out in 191 So., supra, we find that Section 9438 of the Code of 1923 is supplanted so far as it directs or controls the practice or procedure of the court in equity or chancery, but only so far. In other words, in an equity proceeding Section 9438 is not applicable. Likewise, Section 6532, Code of 1923, has been supplanted. Said section set out the proper method of service upon persons of unsound mind in suits in equity. This particular section, under the authority of Act No. 136, H. 16, approved June 15, 1935, (General Acts, 1935, p. 177) has been rewritten under Rule 5, part (c), of the Alabama Equity Rules, which reads as follows:

"Service upon Resident Insane Persons. The summons directed to a person who has been adjudged of unsound mind by a court of this State, or for whom a guardian has been appointed in this State under the so-called Uniform Veteran's Guardianship Act, shall be served upon his guardian, if there be a guardian residing in this State appointed and acting under the laws of this State, unless such guardian shall accept service, and if there be no such guardian or if the court shall learn that the interest of such guardian is adverse to that of the person of unsound mind, the court shall appoint a guardian ad litem for the person of unsound mind with or without personal service of summons on the person of unsound mind as the court may direct. If a guardian ad litem is appointed for a person of unsound mind after defense to the action has been begun by a guardian, the court shall make such order for the protection of the person's interest as it deems proper. The court may also stay an action begun against a person on learning that such person is of unsound mind. When a resident defendant to a bill of complaint is alleged in the bill to be of unsound mind, but has not been so adjudged by a court of this State, such defendant may be brought into court by service of process personally upon him; and a guardian ad litem must be appointed for him under Rule 8."

It will be noted from the above that service upon a person of unsound mind in a suit in equity should be upon the guardian, and if there be no guardian the court is required to appoint a guardian ad litem, and that the summons under those circumstances may be returned with or without personal service (if the guardian be served) on the person of unsound mind, as the court may direct, regardless of whether or not he be confined in an insane hospital.

In suits at law Section 9438 of the Code of 1923 is still applicable.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 12, 1940.

Hon. D. Trotter Jones, Chairman,
Alabama Boxing and Wrestling Commission,
P. O. Box 1069,
Montgomery, Alabama.

American Legion or any local unit thereof not entitled to exemption allowed under Subsection (g) of Section 4 of Act No. 489, S. B. 303, approved September 22, 1939.

American Legion is a patriotic organization and not an educational institution within the terms of the Act.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of February 5, 1940, in which you request my opinion as follows:

"Your opinion is requested as to whether or not a Post of the American Legion is liable for the tax and subject to the rules and regulations prescribed by an Act of the Legislature, approved September 22nd, 1939, number 489 (S. 303-Young), under the following facts:

"The Post is promoting amateur boxing and/or wrestling exhibitions for which admissions are charged and the proceeds are used by the Post in carrying on its boys' work."

In answer to your inquiry, I call your attention to Section 4 of Act No. 489, S. 303, approved September 22, 1939, which provides in pertinent part as follows:

"(g) provided, however, that nothing in this Act shall be construed as permitting, authorizing, or enjoining the Commission to collect any license, permit fee or tax for any amateur boxing, sparring or wrestling matches or exhibitions **held under the auspices of educational institutions when the proceeds** of such are to be used to foster, aid or abet programs of education in the State of Alabama, **or when the same are held under the auspices, rules and regulations or any national amateur athletic association or union.** But no exemption from license, permit fee, tax or charges will be granted to any person, group of persons, or organization for such amateur boxing, sparring or wrestling matches or exhibitions when the proceeds or any part thereof are for personal or private gain; (h) provided, however, that the Commission shall collect from all patriotic organizations chartered by authority of a special Act of the Congress of the United States, or local unit thereof, which has been in existence and held meetings at regular intervals for one year immediately preceding the issuance of the permit, to whom a license or permit is issued, ten per centum of the gross receipts of every boxing, sparring or wrestling match conducted or sponsored by such organization, in lieu of the seventeen and one-half per centum provided for in sub-section (e) above, in addition to other licenses and fees as are herein provided." (Emphasis supplied).

A careful reading subsection (g), *supra*, convinces me that the exemptions are limited to matches or exhibitions held under the auspices of **educational institutions** or when the same are held under the auspices, rules and regulations of **any national amateur athletic association or union**.

Statutes should be construed to effect legislative intent and avoid unjust or absurd conclusion. **Ex parte Rowe**, 59 So. 69.

Meaning of a doubtful word may be ascertained by reference to meaning of words associated with it. **O'Neal v. Turner**, 230 Ala. 24, 158 So. 801.

The word "or" appearing in subsection (g) after the word "regulations" and before the word "any" was clearly intended by the legislature to read "of" and unless this construction is placed thereon, subsection (g) is unintelligible and ambiguous.

The American Legion is a patriotic organization chartered by a special Act of Congress by the United States. I do not believe that it would be termed an educational institution within the meaning or wording of the Act No. 489, *supra*.

Bearing in mind that tax exemptions are to be construed strictly against the taxpayer, I am of the opinion that the American Legion does not come within the exemptions allowed under subsection (g) of Section 4 of Act No. 489, S. B. 303, approved September 22, 1939.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 12, 1940.

Hon. A. F. Harman, President,
Alabama College,
Montevallo, Alabama.

Alabama College—

Board of Trustees has authority to contribute to cost of municipal storm sewerage project that drains college property and tends to safeguard health of college community against epidemics that might arise from unsatisfactory drainage conditions.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of January 25, 1940, in which you request my opinion as follows:

"The town of Montevallo acting as sponsor of a considerable Works Progress Administration project involving the installation of a storm sewer and other drainage facilities is endeavoring to raise the necessary funds for the project by voluntary contributions. Neither the storm sewer nor any of the other facilities in connection therewith will lie within the college property. However, approximately forty percent of the area to be drained by the project is college property. The benefits to the College according to my best judgment are the drainage of the college property and moreover safeguarding the health of the College community against any epidemics that might arise from an unsatisfactory drainage condition.

"The premises considered will you kindly inform me if, in your opinion, the College can legally contribute funds to such project, it being understood that the contribution will be paid to the town of Montevallo under condition that it shall be devoted to the purpose specified.

"Since this is a very urgent matter, I hope that it can be received by your office in the nature of an emergency and that your opinion can be rendered shortly."

An answer to the specific question in your inquiry depends upon a determination of whether or not the making of the appropriation is within the express or implied powers of the Board of Trustees in question as created by the laws of this State.

Alabama College is a corporation, incorporated for educational purposes by an Act of the General Assembly of Alabama. No. 445 S. B. 5, approved February 21, 1893 (General Acts 1892-93, p. 1002), and its principal place of business is at Montevallo, in Shelby County, Alabama. Since its original incorporation, the name of the college has been changed several times. When first incorporated, its corporate name was the Alabama Girls' Industrial School. By the original act of incorporation, it was provided in Section 4 (page 1003):

"That the board of trustees of said institute, and their successors in office shall be, and the same are hereby declared to be a body politic and corporate, and shall have a common seal, shall sue and be sued, contract and be contracted with, and may own, purchase sell and convey property, both real and personal."

By Section 6 of the original Act, page 1004 it was provided: **"That the said board of trustees shall possess all the power necessary and proper for the accomplishment of the trust reposed in them, viz: The establishment and maintenance of a first-class industrial school for the education of white girls in the State of Alabama in industrial and scientific branches, etc."** (Emphasis supplied)

By Section 10 of the original Act, page 1005 it was provided: "That the said board of trustees shall organize under the provisions of this act as soon as practicable after their appointment, and they shall immediately after their organization proceed to procure, by purchase or donation, a site for the location of the Alabama Girls' Industrial School for the education of the white girls of the State of Alabama in industrial and scientific studies. In selecting the site the trustees shall look to the convenience of the people of the State, the

advantages and disadvantages of the different sites proposed, and shall locate the same at the place where most advantages are offered; Provided, **that the location shall be at a place known to be free from annual epidemics**; And provide further, that if the trustees to be appointed shall deem it best or the most practicable way of attaining the desired object, then it may be established as a branch of an already existing school." (Emphasis supplied)

While there have been a number of amendatory acts, the Legislature, with painstaking care, preserved and confirmed unto the corporation all the rights and privileges granted in the original charter. **Alabama College v. Harman**, 234 Ala. 446, 175 So. 394.

By an Act of the Legislature approved September 8, 1923 (Acts 1923, page 255), the name of the corporation was changed to Alabama College, and by that name, it was declared to be, "and shall remain a body corporate" with the right to sue and contract, acquire and hold real and personal property, **and have and exercise all the powers of a corporation established to carry on a state educational institution of higher learning, and shall succeed to all the rights, privileges, emoluments, benefits, interest, and titles heretofore at any time vested in said "Alabama Girls' Industrial School," the "Alabama Girls' Technical Institute," and "Alabama Technical Institute and College for Women," respectively.** **Alabama College v. Harman**, supra.

Section 2 of the same Act (page 257), as did former acts, placed the management and control of the corporation in a board of trustees, and provided for their appointment or selection. **Alabama College v. Harman**, supra.

Section 513 of the Alabama School Code, 1927, provides as follows:

"Section 513. Grants and Rights Preserved.—All rights of property and action which may have accrued to the institute before the adoption of this article are confirmed and preserved, and no grant or gift of any valuable thing or right shall fail by reason of a mistake in the name of this corporation or institute; provided the intention to grant or give to the institute may be derived from the words used in designating the beneficiary or grantee. All rights, powers and remedies granted in and by an Act to create and establish an industrial school in the State of Alabama for white girls, approved February 21, 1893, and any Act amendatory thereof, are confirmed and preserved for the Alabama College."

It is a matter of common knowledge that this school has, from a very insignificant beginning, grown and developed into one of the state's greatest educational institutions.

An examination of the various statutes shows that the Board of Trustees is given full control and management of Alabama College. When funds become unconditionally the property of this institution, the trustees are vested with the direction thereof and their discretion cannot be questioned unless the purpose is totally without the pale of possible benefit to the institution. The Board of Trustees are charged with the duty of maintaining the institution. This would include safeguarding the health of the students and preservation of the lands belonging to the college by proper drainage facilities. The mere fact the storm sewer is not to be located on school property would not be controlling. You state that forty per cent of the area to be drained is college property and furthermore the drainage is necessary in order to

safeguard the college against any epidemics that might arise from an unsatisfactory drainage condition.

The powers granted to the Board of Trustees by the original act and the amendments thereto are very broad and comprehensive. **Biennial Report of Attorney General, 1924-26, page 211.**

Boards of trustees of educational institutions have such powers as are expressly given them by their charters or such as by fair implication as are necessary to the execution of their object. 11 C. J. 981, 14 C. J. S. 14, 27 R. C. L. 139.

This office in an opinion dated January 21, 1939, addressed to the County Board of Education, Shelby County, (Quarterly Report of Attorney General, Vol. 14, p. 19), held that County Board of Education legally may contribute to the cost of a municipal sewerage project to the extent of said project's worth and value to public school property by affording sanitary facilities thereto. This opinion cited as authority the language used by Mr. Chief Justice Anderson in the case of *Eutaw v. Coleman*, 189 Ala. 164, 66 So. 464.

"I base my conclusion solely upon the theory that the payment in question was a betterment or improvement of the county property, being upon the border thereof and tending to beautify same, make it perhaps more accessible, as well as comfortable, to the occupants of the courthouse by preventing to some extent mud in winter and dust in summer. The fact that a municipal street was thereby improved was but an incident to the improvement of the courthouse square and its borders or immediate surroundings, so far as the county was concerned, and while the county had no right to control the municipal street, yet, if the town was willing for it to enter upon the street or cooperate with it, the county had the authority to do so if it was for the purpose of improving or benefitting the county property, although by doing so it might or did improve the municipal highway. Suppose the property surrounding the courthouse was not a street but belonged to an individual, in whole or in part, and was in such a condition as to mar the beauty of the courthouse and grounds, or interfere with the approach thereto, or cause it to be flooded during a wet season, could not the county remedy the defects, with the consent of the owner, although by doing so the said adjoining property would be benefitted? I think so. Could it be questioned that the county could drain or sewer its lot even if the pipes or curbing were placed on the lands of another, in whole or in part, with the consent of the owner, even though it also benefitted the property upon which said improvement encroached? I think not. Could not the county inclose and improve the borders of its property by a wall or fence and place the same over its line, in whole or in part, with the consent of the adjoining owner, although it also benefitted the property upon which the improvements encroached? I think so. It may be that paving the streets in question was primarily the improvement of the municipal highway, so far as the town is concerned, but, as to the county, it was but an improvement of its property, and the fact that it also operated to improve the streets was a mere incident to the betterment of its property. If the county could make such improvements alone, there is no sound reason why it could not cooperate with the adjoining owner in doing something mutually beneficial."

In my opinion the Board of Trustees of Alabama College has implied authority to contribute to the cost of a municipal storm sewerage project that drains college property and tends to safeguard the health of the college community against epidemics that might arise from unsatisfactory drainage conditions.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 12, 1940.

Hon. J. M. Wilson,
Clerk, Circuit Court,
Tallapoosa County,
Dadeville, Alabama.

1. Sheriff is entitled to a fee of fifty cents for serving notice provided for in Section 4 of Act No. 227, H. 417, approved August 16, 1939.

2. Clerk is entitled to receive fifteen cents per hundred words for making final record in a case disposed of in accordance with the provisions of Act No. 227, H. 417, approved August 16, 1939.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 24, 1940, in which you request my opinion as follows:

"Under Acts 227-H. 417 of the Regular Session of Legislature, 1939, in felony cases a defendant who desires to plead guilty makes it known unto the court and the court in turn sets down a date for the hearing of said plea and if the defendant is unable to employ counsel the court appoints a member of the bar to represent said defendant.

"The Sheriff is directed to serve a copy of the order, giving the date and hour of said hearing, on the defendant and upon his counsel.

"Please tell me how the Sheriff is to be paid for the above services? From the Department of Corrections & Institutions or from the Fine & Forfeiture Fund of the County?

"The Clerk of the Circuit Court is required to make a final Record in all cases. For this he is paid a fee of \$3.00. Of course, this is where he was indicted by the Grand Jury and stood trial. What is the Clerk entitled to for making a Final Record in a case which is disposed of by

the Acts of 227-H 417? Please tell me what fees a clerk is entitled to in a case disposed of in this manner."

Act No. 227, H. 417, mentioned by you in your letter of inquiry, was approved August 16, 1939 (General and Local Laws of 1939, page 367). The said act provides for a method whereby one who is charged with a certain type of felony case may plead guilty and begin serving his sentence without awaiting the action of a grand jury.

Section 4 thereof is pertinent to your first inquiry and is as follows:

"Section 4. When such information has been filed as hereinabove provided, and counsel employed or appointed, the court shall, by order entered upon the minutes of the court, fix a date for the defendant to formally make and enter his plea of guilty in open court, which date shall not be within fifteen days after the arrest of the defendant nor within three days after notice to the court of his intention to plead guilty and notice of which date shall be served by the sheriff upon the defendant and upon his counsel."

It is my opinion that a sheriff is entitled to receive a fee of fifty cents for the service of the notice provided for in the above quoted section. Such a fee is authorized under the provision of Section 3741, Code of Alabama, 1923, wherein it is provided as follows:

"Sheriffs are entitled to following fees and allowances in criminal cases—

"For serving each subpoena or notice50"

The fee is to be taxed as a part of the costs in the case and collected as other costs therein. The Department of Corrections and Institutions only pays those fees specified in Section 3667, Code of Alabama, 1923, which section does not make any provision for the payment of a fee to a sheriff for serving a notice. It is my opinion, therefore, that where such a fee is properly taxed against the defendant and judgment rendered therefor that the fee must be collected from the defendant, or in the event the defendant is insolvent and an execution has been returned to that effect, the sheriff may thereupon collect the fee from the fine and forfeiture fund of the county. Section 4039, Code of Alabama, 1923, as amended.

In answer to your second inquiry, it is my opinion that the clerk is entitled to receive the sum of fifteen cents per hundred words for making final record in cases disposed of under the provisions of Act No. 227, H. 417, supra, to be paid from the funds of the Department of Corrections and Institutions.

I note with interest your reference to the fact that you state that the fee for making final record is \$3.00 and is payable only in cases started by an indictment. I do not understand this to be the law, although I am informed that the Department of Corrections and Institutions and its predecessor, the Convict Department, has, with the consent of the clerks over the State, followed the uniform practice of paying \$3.00 for making final record in all such cases, regardless of the number of words in each final record. This is, of course, a matter between the Department of Corrections and Institutions and the various clerks.

I do not believe, however, that the Department of Corrections and Institutions can refuse to pay a clerk for the making of a final record in a case disposed of under the provisions of Act No. 227, supra, merely because of the departmental ruling to the effect that payments for making final record shall be made only in cases begun by indictment and where a trial was held.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 13, 1940.

Hon. C. E. Carmichael,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Municipal Elections—Election of commissioners under Section 2341 of the Code of Alabama, 1923, as last amended by Act No. 184, S. 252, approved July 8, 1935 (General Acts, 1935, page 235), should be appointed in the manner provided in Section 1880 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 31, 1940, in which you request my opinion as follows:

“Beginning with Section 2335 of the Code the manner in which a municipality changes to a Commission form of government is provided for. The town of Muscle Shoals in Colbert County, of which county I am Judge of Probate, through and by a petition filed by the requisite number of qualified electors as provided for under Section 2336 was presented to me as such Judge. On examination of the same I found that the petition contained the requisite number of electors to authorize the election and I immediately certified this fact to Honorable W. H. Green, Mayor of the town of Muscle Shoals. Under Section 2337 the Mayor by his proclamation called the election for September 22. There is considerable feeling among the factions in this town and the Mayor undertook to recall this proclamation for this election. The town board prepared no ballots and appointed no officers to hold the election. The ones who wanted the form of government changed appointed their own inspectors, clerks and returning officer, and held this election; the result being 81 for the change and none against. The Mayor and Aldermen would not canvass the return and the Mayor would not certify the result of the election to the Governor, the Secretary of State and to me as Judge of Probate as provided for in Section 2340. The ones who held

this election filed mandamus against the Mayor and Aldermen to require them to canvass the return and to make the certificate by the Mayor as provided for in Section 2340. This mandamus was heard before Honorable C. P. Almon, Circuit Judge of Tusculumia on October 7, which resulted in a judgment for the petitioners against the Mayor and Aldermen requiring them to so certify as provided by law. Instead of certifying this the Mayor and Aldermen appealed to the Supreme Court, and this case was affirmed by the Supreme Court some two weeks ago. The Mayor then certified the election as provided for under Section 2340. Under Section 2341 I have called the election to elect the three Commissioners provided for under Section 2341 as amended. Under Section 2336 it was my duty to certify the list of electors to the Mayor and under Section 2337 it was his duty to call the election to see whether the Commission form of government would be adopted. Under Section 2341 it is my duty to call the election at the expense of the town of Muscle Shoals, and there is no provision whereby I shall certify that I am calling this election, which appears to me that I not only call the election but appoint the election officers. However, I have not appointed these officers as yet. I would like very much to have a ruling from your office as to whether or not I am the one to name these election officers. I am of the opinion that it is my duty as such judge not only to call the election but to name the election officers. It appears to me that this is the intention of the statute in order that these officers may be appointed clear of the factional fight in the town. This question was discussed on Tuesday of this week with your assistant, Honorable Willard McCall, and the question was gone into at some length. I am writing you this letter and will ask you to please render this opinion to me at the very earliest time convenient for I desire to appoint these officers to hold the election just as soon as I can get the opinion, provided of course your opinion backs my position that I am the one to appoint them."

Section 2341 of the Code of Alabama, 1923, as last amended by Act No. 184, S. 252, approved July 8, 1935 (General Acts, 1935, page 235), reads in pertinent part as follows:

"2341. Appointment of commissioner; term of office.—Immediately after the adoption of such form of government, which shall go into effect upon election and qualification of the commission, the probate judge of the county, with whom the petition was filed, shall forthwith call an election to be held under and to be governed by article 46 chapter 43 of the code of Alabama, 1923, except as changed herein, the expense thereof to be paid by the municipality, for the election of three (3) commissioners by the qualified electors of the municipality. * * *" (Emphasis supplied)

Thus, it may be seen from the above quoted portion of said statute, as amended, and especially the emphasized part thereof, that the election called for the selection of the three commissioners by the qualified electors of the municipality is "to be held under and to be governed by Article 46 Chapter 43 of the Code of Alabama, 1923, except as changed herein."

Section 2340, which is a part of Article 46 of Chapter 43 of the Code of Alabama, 1923, provides for the method of holding an election under the provisions of said article and reads in pertinent part:

"The election thereupon shall be conducted, the vote canvassed and the result declared in the same manner as provided by law in respect to other city elections."

City elections generally are conducted in accordance with the provisions of Article 12 of Chapter 43 of the Code of Alabama, 1923 (Sections 1880-1887), and Section 1880 of said article, dealing with the appointment of election officials, reads as follows:

"1880. Municipal election held under general election laws; officers of.—Elections in cities and towns of this state shall be conducted according to the general election laws, except as otherwise provided in this chapter. The council shall appoint three inspectors, two clerks and one returning officer for each polling place, and may direct one or more polling places to be opened in each ward. It shall be the duty of the mayor and clerk to provide for the opening of said polls and to give at least ten days' notice by publication in a newspaper published in such city or town, if any, or by posting such notice in three public places in the municipality. Such notice shall give the names of the election of the polling places. If an inspector is absent at the time of opening the polls, those present may appoint a person to fill the vacancy. If all are absent, any three qualified electors of the municipality and of the ward may act as inspectors and appoint two clerks and a returning officer to fill the vacancy, if any."

The premises considered, it is my opinion that election officials to conduct the election provided for by Section 2341, as amended, *supra*, must be selected in accordance with the provisions of Section 1880, *supra*. Consequently, they would not be appointed by the judge of probate of the county in which the municipality is located, but rather by the council of the municipality. It might be well to here point out that the officials of the municipality under the old form of government do not cease to function until the commissioners are elected and qualified. See Section 2341, as amended, *supra*.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 14, 1940.

Dr. Walter B. Jones,
Director of Conservation,
Montgomery, Alabama.

Mobile County—16th Section School Lands—

The revenues from sale, lease or other disposition of 16th Section School Lands in Mobile County are in no wise affected by Section 270 of the Constitution, and belong to the Public School Fund defined by Section 260 of the Constitution.

Such revenues are no part of **special income** within the meaning of Section 270 of the Constitution relating to schools in Mobile County.

Such revenues fall within the funds provided for under Act No. 581, H. 851, approved September 22, 1939 (Pamphlet Acts, 1939).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of December 16, 1939, in which you request my opinion as follows:

"Re: Request for an opinion regarding the legal status of 16th section school lands in Mobile County, Alabama.

"On September 22, 1939 the Governor approved a bill (No. 581-H851-Dominick) transferring the management and supervision of School Lands from the Department of Education to the Department of Conservation and this bill further provided for the disposition of the revenue to be derived from said lands.

"Section No. 260 of the Constitution of Alabama, Article No. 14 provides as follows:

"The income arising from the sixteenth section trust fund, the surplus revenue fund, until it is called for by the United States government, and the funds enumerated in sections 257 and 258 of this constitution, together with a special annual tax of thirty cents on each one hundred dollars of taxable property in this state, which the legislature shall levy, shall be applied to the support and maintenance of the public schools, and it shall be the duty of the legislature to increase the public school fund from time to time as the necessity therefor and the condition of the treasury and the resources of the state may justify; provided, that nothing herein contained shall be so construed as to authorize the legislature to levy in any one year a greater rate of state taxation for all purposes, including schools, than sixty-five cents on each one hundred dollars worth of taxable property; and provided further, that nothing herein contained shall prevent the legislature from first providing for the payment of the bonded indebtedness of the state and interest thereon out of all the revenue of the state."

"Section No. 270 of the Constitution of Alabama, Article 14 provides as follows:

"The provisions of this article and of any act of the legislature passed in pursuance thereof to establish, organize, and maintain a system of public schools throughout the state, shall apply to Mobile County only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation as now authorized by law for the benefit of public schools

in said county shall remain undisturbed until otherwise provided by the legislature; provided, that separate schools for each race shall always be maintained by said school authorities.'

"Section 8 of Act No. 581-H851-(Dominick), supra, provides as follows:

"The revenue derived from any sale of timber or minerals from, or rental or lease of, any School Lands shall be paid by the Director of Conservation to the State Treasurer to be deposited to the credit of the proper township or townships as provided for by the Constitution and Laws of Alabama. An itemized statement of the revenue derived from such sale or lease shall be immediately forwarded by the Director of Conservation to the State Superintendent of Education, and such statement shall show the items of sale, the amount of revenue derived therefrom and a description of the lands from which the sale or lease was made. The Superintendent of Education, upon receipt of such itemized statement, shall immediately cause a report to be transmitted to the State Treasurer showing which township or townships shall receive credit for such revenue and the amount of credit which shall be made thereto.'

"I wish to particularly call your attention to that part of Section No. 270 of the Constitution which states as follows:

" . . . and all special incomes . . . as authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature . . . '

"I would like to have an opinion as to whether the revenue derived from 16th section land is 'Special income' within the meaning of Section No. 270 of the Constitution which would place said revenue under the provisions of H. B. No. 581-H851-Dominick, supra, and whether or not the Department of Conservation under the provisions of said bill has the power and authority to manage and supervise the timber on 16th section lands in Mobile County, Alabama."

In **Tucker et al. v. State ex rel. Poole, Solicitor**, 231 Ala. 350, 356, 165 So. 249, it was observed that Section 270 of the Constitution which you have quoted was merely a provision designed especially to exempt the County of Mobile that it may continue with its own separate and distinct school system."

Section 257 of the Constitution provides that:

"The principal of all funds arising from the sale or other disposition of lands or other property, which has been or may hereafter be granted or entrusted to this State or given by the United States for educational purposes shall be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully grants or appropriations."

In **Opinions of the Justices**, 215 Ala. 524, 111 So. 312, in referring to Section 256 of the Constitution, it is said:

"The public school fund dealt with by this section is the fund arising from the specific sources enumerated in and appropriated to the general

public school fund by sections 257, 258, 259, of the Constitution, and such supplement thereto as may be set apart out of the general treasury to this fund by the general quadrennial appropriation act, referred to in section 71 of the Constitution, and other appropriations set apart to the school fund to be apportioned under the Constitution and statutes by the educational authorities of the state."

Section 260 of the Constitution, above quoted in your letter, operates to impress a trust upon all funds arising from 16th section lands, by way of sale, lease or otherwise, **in perpetuum**, for the support and maintenance of public schools, and is unaffected by Section 270 as above shown.

In re: **Opinions of the Justices**, 229 Ala. 98, 155 So. 699; **Turnipseed et al. v. Blan, State Treasurer**, 226 Ala. 549, 148 So. 116.

I am of opinion, therefore, in response to your inquiry "whether the revenue derived from the 16th section land is 'special income' within Section 270 of the Constitution," that such revenue is not such special income, and that the same must be held and used as required by Section 256 of the Constitution.

In **Hall v. Blan, State Treasurer**, 227 Ala. 64, 148 So. 601, it is said:

"As for funds devoted by the Constitution to specific purposes, no legislative act could make it lawful to commingle such funds with others, resulting in diverting any part of same to other purposes, however lawful, as regards funds from which they may be paid. The Constitution governs both the legislative and executive officers."

Section 1 of Act No. 581, H. 851, approved September 22, 1939, commits to the Director of Conservation "complete management of, and supervision over lands which are known as school lands, as defined by Section 629 of the 1927 Alabama School Code; which lands are vested in, or which may hereafter be vested in, the State of Alabama in trust for the use of schools."

Section 629 of the School Code defines "school lands" as "Sections numbered sixteen, in every township granted by the United States for the use of the schools in the township, and such other lands as may have been granted to any township or district for the use of schools."

The act in effect constitutes the Director of Conservation trustee of these school lands, to be "managed and supervised" by him in his capacity as trustee. It does not undertake to empower him to use the proceeds of sale, or the income, of such lands otherwise than as provided by the Constitution or the terms of the original grants themselves, and is not, therefore, in any sense offensive to the Constitution.

The act here under consideration did not give to a state agency any additional power or authority. It merely transferred from the Department of Education to the Department of Conservation the duty of supervising and administering the 16th Section Lands in this state. It is my information that throughout the years the Department of Education of the State of Alabama, which department, prior to the passage and approval of Act No. 581, H. 851, approved September 22, 1939, was charged with the duty of ad-

ministering and supervising 16th Section Lands, had charge of the 16th Section lands in Mobile County, as well as such lands located in the other counties of the state. This administrative construction is of value in arriving at the conclusion here reached.

You are advised, therefore, that the Department of Conservation and the Director of Conservation, as its representative, are by virtue of the act empowered to manage and supervise the timber on 16th Section lands in Mobile County, Alabama," except such, of course, if any, as have been heretofore legally conveyed or otherwise disposed of in accordance with law.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 14, 1940.

Hon. Ben M. Smith,
Brigadier General,
The Adjutant General,
Montgomery, Alabama.

National Guard—Control of Appropriations—

Under the provisions of Section 2 of Act No. 508, H. 772, approved September 21, 1939, the Governor may direct that any part of the appropriation made for care and maintenance of State Armories by Section 1, V., 1, of Act No. 247, S. 239, approved August 24, 1939, be expended to cooperate with the Works Progress Administration of the United States in the construction of military warehouses for the use of the State Military Department.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of January 18, 1940, in which you request my opinion as follows:

"Section 1, V. 1, of the General Appropriation Act No. 247, approved August 24, 1939, appropriates the following appropriation 'For care and maintenance of State armories to be expended under the direction of the Director of Finance with the approval of the Governor \$18,750.00.' The counterpart of this appropriation under the old Appropriation Act for the quadrennium ending September 30, 1939, (Act No. 103, approved February 17, 1937), was an item in the Military Department appropriation reading as follows 'Armory Service Allowances \$10,000.'

"The funds available under the old 'Armory Service Allowance' were for years used not only for making repairs and improvements and for

maintenance to State armories assigned to the use of the several organizations of the National Guard and in the several communities where they are stationed but also the State warehouses and other similar buildings used by the State Military Department for the storage of arms, ammunition and other military equipment and for the repair of such equipment of the National Guard, and also for construction of new structures of that nature. This Department has construed the new appropriation known as 'Care and maintenance of armories' as being intended by the Legislature for use for the same purposes as the old 'Armory Service Allowance.' At the present time this Department is constructing through the cooperation of the WPA a truck shed and warehouse annex adjacent to the present State Military warehouse, and desires to pay its portion of the cost of material therefor out of this appropriation. The Department of Finance has taken the stand that this appropriation can be used only for care and maintenance of armories assigned to the use of the several National Guard organizations situated in the several communities in the State, and that it can not be used for new construction of any nature or in any connection with the construction of the State Military truck shed or warehouse.

"Your opinion is requested as to whether the appropriation for 'Care and maintenance of State armories' under the Act approved August 24, 1939, can be lawfully used for care and maintenance of the State Military truck shed, warehouse, etc., used by this Department for the benefit of the National Guard as well as for care and maintenance of armories assigned to organizations. Your opinion is further requested as to whether said appropriation can be used for new construction of armory building or of warehouse truck sheds, and other similar buildings or structures for the benefit of the National Guard.

"Your attention is also called to the provisions of Sections 5, 6 and 7 of the Armory Commission Act of 1935 (Act No. 276, approved August 23, 1935) as amended by Act 508, approved September 21, 1939. If your opinion as to any of the points raised in the preceding paragraph is in the negative it is requested that you give your opinion as to whether Sections 5, 6 and 7 of said Armory Commission Act as amended authorize the Armory Commission to construct new armories, warehouses, sheds, etc., for the use of the State Military Department and the Alabama National Guard and whether the Governor under authority of said Section 5 can authorize the payment of the cost thereof out of said appropriation for 'Care and maintenance of State armories.'

"Your early attention to this matter will be greatly appreciated, inasmuch as the requested information is needed to make possible the immediate purchase of material for use on WPA Project for constructing a truck shed and warehouse annex to the State Military warehouse, which buildings are now in the course of construction."

An answer to your inquiry involves construction of the following provisions of the statutes:

The General Appropriations Act of 1939 (Act No. 247, S. 239, approved August 24, 1939) in pertinent part provides:

"Section 1. That there is hereby appropriated for * * * V. Law Enforcement: 1. Military Department: * * * For care and maintenance of State Armories to be expended under the direction of the Director of Finance, with the approval of the Governor, \$18,750."

Section 6 of Act No. 509, H. 773, approved September 22, 1939, which amends Section 16 of the 1936 Military Code of Alabama, provides:

"Section 6. * * * 'Section 16. DEPOSITORIES OR ARSENALS: The Governor shall when necessary designate a depository, or depositories, for the undistributed military property of the State, or in the custody of the State, which same shall be maintained at the expense of the State. Any portion of any regular appropriation for the support of the State Military Department and State Militia which is unexpended and unobligated after the expiration of the eleventh month of any fiscal year shall be available for use in building, rebuilding, repairing, enlarging, equipping, and maintaining a centrally located depository, arsenal, military warehouse, shop, and garage for the purposes named above and for the upkeep and repair of such property, and shall also be available for the payment of expenses and obligations of the Armory Commission of Alabama in carrying out its duties, or for providing necessary office furniture, equipment, or supplies for the headquarters and units of the Alabama National Guard in accordance with priorities established by the Adjutant General.'"

Section 28 of said act, referred to next hereinabove, which amends Section 187 of the 1936 Military Code of Alabama, provides:

"Section 28. * * * * Section 187. REGULAR MILITARY APPROPRIATIONS: The Legislature of Alabama shall appropriate during each of its regular sessions, or during such other sessions as conditions may require, a sufficient sum of money, based upon estimates and recommendations of the Adjutant General and approved by the Governor, for the purpose of defraying the expenses of the State Military Department in carrying out the provisions of this Act, and such other expenses connected with the organization, maintenance, support, upkeep, administration, armament, training, and discipline of the National Guard or Naval Militia of Alabama and other expenses of a general or special nature as may be to the interest and benefit of the National Guard or Naval Militia as the Governor may approve.* * * The Governor shall prescribe necessary rules and regulations governing the manner and method of disbursing moneys authorized by this Section to be appropriated, and all expenses authorized to be contracted shall be certified to and verified by affidavit, with itemized vouchers and orders attached. Any portion of any item of any regular appropriation for the support of the State Military Department and State Militia which is unexpended and unobligated after the expiration of the eleventh month of any fiscal year shall be available for use in taking care of any expenses of operating the State Military Department for which the regular appropriation shall be insufficient for that fiscal year.'"

Section 3 of Act No. 508, H. 772, approved September 21, 1939, which amends Section 6 of Act No. 276, S. 362, approved August 23, 1935 (General Acts, 1935, pages 672, 674), provides:

"Section 3. * * * **Section 6. Providing Armories, Grounds, and Other Facilities:** The Armory Commission of Alabama shall provide adequate armories, buildings, equipment, furniture, target ranges, and other necessary facilities for the proper housing, instruction, training and administration of all units and headquarters of the National Guard and Naval Militia of Alabama; shall provide for the State Military Department like facilities needed for the proper protection, care, maintenance, repair issue and upkeep of public property of the State of Alabama and of the United States issued to or for the use of the National Guard or Naval Militia of Alabama, and for the proper and efficient administration of the Alabama National Guard and Naval Militia; and shall provide for the maintenance, upkeep, repair, and improvement of such facilities."

Section 2 of said act, referred to next hereinabove, which amends Section 5 of said Act of 1935, referred to next hereinabove, provides:

"Section 2 * * * **Section 5. Payments from Military Funds:** The Governor of Alabama is hereby authorized to use, in his discretion, any part of any appropriation heretofore or hereafter made for any military purposes of for the benefit of the State Militia or any part thereof, for the purpose of paying any part or all of any expenses or obligations incurred by the Armory Commission of Alabama after August 23, 1935, in carrying out its duties under this Act. ' "

Under Section 3 of Act No. 508, supra, it is made the duty of the Armory Commission of Alabama to provide for the State Military Department adequate "armories, buildings * * * and like facilities needed for the proper protection, care, maintenance, repair, issue and upkeep of public property of the State of Alabama and of the United States issued to or for the use of the National Guard, or Naval Militia of Alabama * * *."

Section 2 of said Act No. 508, supra, authorizes the Governor in his discretion, to use any part of any appropriation made for any military purpose, for the purpose of paying any or all of the expenses incurred by the Armory Commission, after August 23, 1935, in carrying out its duties under the Act.

Section 6 of Act No. 509, supra, authorizes the Governor when he deems it necessary, to designate depositories for undistributed military property of the State or in its custody, which depositories shall be maintained at the expense of the State. It further provides that any appropriation made for the support of the Military Department and the State Militia, unexpended and unobligated at the expiration of the eleventh month of any fiscal year, shall be available for use in building, rebuilding, repairing, enlarging, equipping and maintaining a centrally located depository, arsenal, military warehouse, shop and garage.

Section 28 of Act. No. 509, supra, has a similar provision authorizing the expenditure of the balances of appropriations for military purposes, which are unexpended and unobligated after the expiration of the eleventh month of any fiscal year, for the purpose of operating the State Military Department, for which the regular appropriation therefor shall be insufficient for that fiscal year. Act No. 508 was approved by the Governor and became law one day before the date upon which Act No. 509 was enacted into law.

The rule of construction is that laws pending in the Legislature at the same time and enacted at the same session are construed in *pari materia*; and that their provisions are presumed not to conflict if reasonably possible to arrive at such a construction. Alabama Digest, Title "Statutes" Key No. 225 $\frac{1}{4}$.

It might appear, upon casual consideration, that the provisions of Sections 6 and 28 of Act No. 509, *supra*, authorizing the use of balances of funds appropriated for any military purposes which are unexpended and unobligated at the end of the eleventh month of any fiscal year to make up deficiencies in appropriations for other military purposes during that fiscal year, are in conflict with the provisions of Section 2 of Act No. 508, *supra*, which authorize the Governor, in his discretion, to use any part of any appropriation heretofore or hereafter made for any military purpose or for the benefit of the State Militia or any part thereof, for the purpose of paying any part or all of any expenses or obligations incurred by the Armory Commission of Alabama after August 23, 1935, in carrying out its duties under said Act.

However, applying the rule of construction noted, *supra*, it is my opinion that there is no conflict between the two provisions. They are complementary and not conflicting.

The authority contained in Sections 6 and 28 of Act No. 509, *supra*, relating to expenditures of balances, unexpended and unobligated at the end of the eleventh month of any fiscal year, of appropriations for military purposes, are not conditioned upon approval of the Governor. As a matter of law, these balances, unexpended and unobligated at the end of the eleventh month of the fiscal year, are made available to meet the deficiencies in the appropriations made for any other military purposes in the event of such deficiency.

The provisions of Section 2 of Act No. 507, *supra*, vest the Governor with the authority and power to use, in his discretion, any part of any appropriation made for military purposes to pay any or all of the expenses and obligations incurred by the Armory Commission after August 23, 1935, in carrying out its duties under the law. Under these provisions, the Governor is not required to wait until the end of the eleventh month of any fiscal year to use any military appropriation in paying obligations so incurred by the Armory Commission of Alabama. The Governor is given complete control in directing the expenditures of appropriations made for military purposes at any time during the fiscal year, and without reference to whether or not his determination to make expenditures from funds appropriated for state military purposes for paying any or all obligations incurred by the State Armory Commission will result in a deficit in the appropriations made to any other military purpose.

So that, the Governor is authorized, under Section 2 of Act No. 507, *supra*, to use the appropriation made by Act No. 247, *supra*, "for care and maintenance of state armories to be expended under the direction of the Director of Finance, with the approval of the Governor, \$18,750.00," for the purpose of paying any part of expenses or obligations incurred by the Armory Commission in carrying out its duties. And Section 3 of Act No. 508, *supra*, makes it the duty of the Armory Commission to provide for the State Military Department necessary facilities for the protection, care, maintenance, repair, issue and upkeep of the public property of the State of Alabama

and of the United States issued to or for the use of the Alabama National Guard.

It necessarily results, in my opinion, that if the Armory Commission has authorized the construction, with the assistance and cooperation of the Works Progress Administration of the United States, of a truck shed and warehouse annex and has agreed to pay its portion of the costs of the materials, and if the Governor, in his discretion has authorized the use of the appropriation of \$18,750.00, referred to hereinabove, or any part thereof, for said purpose, the same is available therefor.

It will be noted that the statute making the appropriation requires that it shall be expended "under the direction of the Director of Finance." In my opinion, this provision, taken into connection with Section 2, *supra*, does not mean that the Director of Finance shares with the Governor the authority to determine whether or not the allocation of all or any part of the appropriation shall be made to any particular obligation incurred by the State Armory Commission. It means simply that, when the Governor has determined that it shall be used for a particular Armory Commission obligation the expenditure therefor of the amount authorized by the Governor shall be under the direction of the Director of Finance.

You posed your inquiries in such form and manner that I believe that the general discussion, above, will answer them more clearly than if I had undertaken to answer each inquiry categorically.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 14, 1940.

Hon. Rufus H. Bethea,
Chairman, Board of Registrars,
Jefferson County,
Birmingham, Alabama.

Elections—

1. County governing body of Jefferson County must allow Chairman of the Board of Registrars, out of county funds, reasonable expenses for such clerical help as may be necessary for the efficient discharge of the duties of his office, under Section 403 of Michie's Alabama Code of 1928.

2. The duties placed upon Probate Judges under Sections 387 388 and 402 of Michie's Alabama Code of 1928 have been transferred from the Probate Judge to the Chairman of the Board of Registrars of Jefferson County, and the expenses incurred in the performance of said duties by the Chairman of the Board of Registrars must be paid as other expenses of the county are paid.

3. Chairman of the Board of Registrars of Jefferson County should revise list of qualified electors to be furnished inspectors at special elections to show only those qualified as of February 1 preceeding such election.

4. However, for special elections for the City of Birmingham, municipal authorities must prepare own list of qualified electors of the City of Birmingham to be furnished election inspectors of the Jefferson County thus prepared by the Chairman of the Board of Registrars of Jefferson County.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of February 9, 1940, in which you request my opinion as follows:

"Subject: List of qualified voters required of the Board of Registrars of Jefferson County for special election to be held to fill the vacancy in the President of the City Commission of Birmingham.

"Under the provisions of a law passed by the 1935 Legislature, should a vacancy occur in the position of President of the City Commission of Birmingham a special election is to be held within twenty-one days thereafter to fill such vacancy. Such vacancy occurred February 7th, 1940.

"Is the Board of Registrars required to furnish an official list for this election? If so, can this list be other than the printed list of 1938? Will the City, County or State pay for the large number of extra clerks and typists necessary to compile such a list? Does the list have to be published?

"I call your attention to an opinion rendered to Hon. Charles E. McCall, State Auditor, under date of February 4, 1935 with reference to the Prohibition Referendum Election of February 26, 1935.

"The difficulties of producing a list for the special election to be held in the City of Birmingham prior to February 28th, 1940 are considerably greater than those that existed in the 1935 case.

"We have in our office the largest registration in the history of the County. A total in excess of two thousand persons registered in the ten day period from January 22nd to February 1st, 1940, inclusive. It will be several days before work is completed on this registration. The largest poll tax receipts in the history of the County were paid in to the Tax Collector. We can hardly expect to get his returns prior to February 25th to March 1st. In addition, many Precincts and Districts in the City have been rearranged and some new districts added. As I see the matter from a practical standpoint the only practicable solution is the use of the 1938 list, without any correction, and the use of challenge oath by voters not listed."

In reply to your inquiry, I call your attention to Act No. 148 S. 173, approved August 15, 1923 (General Acts, 1923, page 109) which provides for

the government by a commission of all cities in Alabama which now have or which may hereafter have a population of 100,000 people or more, according to the last Federal Census or any subsequent census which may hereafter be taken, and provides for the selection and election of commissioners and their terms of office, etc. Section 25 of Act No. 148, supra, provides as follows:

"General election laws.—All general laws of this State regulating and prescribing the conduct of municipal elections and the qualifications and registrations of voters thereat, shall apply to elections hereunder, except so far as expressly modified herein."

Section 18 of Act No. 148, supra, was amended by Act. No. 38, H. 93, approved February 9, 1935 (General Acts, 1935, page 69) and provides as follows:

"Section 18. Whenever any vacancy or vacancies shall occur in the office of president of the commission or other commissioner of any city organized under the provisions of this Act, by death, resignation, removal, or any other cause, the election commission of such city shall forthwith call a special election to fill such vacancy or vacancies, such election to be held not less than fourteen (14) and not more than twenty-one (21) days from the occurrence of such vacancy or vacancies. Notice of such election shall be given at the expense of such city by one publication at least ten (10) days in advance of the same in one or more newspapers published in such city. The method, procedure and requirements of qualifying, voting upon and determining the successful candidate or candidates shall be the same as is herein provided relative to the election of the president and other commissioners in quadrennial elections, except that statements of candidacy must be filed at least seven (7) days before the date set for such election. Successors to the president other commissioners chosen at any such election shall qualify for office as soon as practicable thereafter, and shall be clothed with and assume the duties, responsibilities and powers of such office immediately upon such qualification, and shall hold office for the unexpired term of their predecessor or predecessors, unless such term be sooner terminated by recall as herein provided."

Section 387 of Michie's Alabama Code of 1928 provides in pertinent as follows:

"The judge of probate shall after the first day of February, 1922, and of each year thereafter compare such official list of registered electors and the poll tax lists which have been furnished him by the tax collector, and shall ascertain from such comparison the names of such persons on the official list of registered electors who have failed to pay any poll tax which they are legally due, and by such comparison and other available information, said judge of probate shall make correct alphabetical lists of all the qualified electors registered by precincts and of districts of precincts where precincts have been divided or subdivided and who have paid all poll tax due. * * * "

Section 388 of Michie's Alabama Code of 1928 provides as follows:

"388. List of voters and electors.—The judge of probate shall, from the registration list returned to his office, including those registered prior to January 1, 1903, make correct alphabetical lists of the qualified electors registered by precincts, which lists shall be certified by him officially to be a full and correct copy of the lists of registered electors for each precinct respectively, as the same appears from the returns of the board of registrars on file in his office. **One copy of said list for each precinct the judge of probate shall deliver or cause to be delivered to the inspectors in each precinct immediately preceding every election or primary.**" (Emphasis supplied)

Section 402 of the 1936 Supplement to Michie's Code of 1928 (General Acts, 1931, page 293) provides in pertinent part as follows:

"402. Clerical assistants to make inspection list.—The judge of probate may employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which the judge of probate is required to furnish the election inspectors. Such assistants shall be paid out of the county treasury by warrants drawn by the commissioners court, board of revenue, or other governing body, on certificates of the probate judge, accompanied by the certificates of the person being paid, showing the amount is due under the provisions of this article; but the entire amount spent for such assistants and clerical help shall not exceed a sum equal to the amount obtained by multiplying the number of names on said list by five cents. * * *."

It will be noted that the duties under Sections 387, 388 and 402, supra, all of which are a part of Article 3 of Chapter 19 of the Code, devolve upon the Probate Judge of the various counties. However, Section 403 of Michie's Alabama Code of 1928 (General Acts, 1927, pages 277, 278) provides a different set-up for counties having a population of more than 150,000. Section 403 is as follows:

"403. Salary or compensation of board of registrars.—The chairman of the board of registrars in counties having a population of more than one hundred and fifty thousand, according to the last or any succeeding federal census, shall be furnished an office at the court house in such counties by the board of revenue, or board of like jurisdiction. In such counties, where there is more than one court house, the board of revenue or board of like jurisdiction, shall determine at which court house the office of the Chairman of the board of registrars shall be located. **The chairman of the board of registrars shall have the power and authority to employ a chief clerk and such other clerical help as may be necessary for the efficient discharge of the duties of his office. The chief clerk shall be paid the same salary, in the same manner, as is paid to the other chief clerks in the several departments of the county as fixed by the board of revenue, or board of like jurisdiction. The salaries of the said chief clerk and other clerical assistants shall be fixed by the board of revenue, or board of like jurisdiction. The chairman of the board of registrars shall receive a salary of three thousand dollars per annum, to be paid in twelve monthly payments, out of the funds of the county treasury, in the same manner as other officers are paid. For each working day spent by the chairman of the board of registrars for the purpose of registering voters, the State shall pay the amount paid to the other registrars, said amount being in addition to the salary hereinbefore stated, and in all such counties the duties,**

power and authority given to and required of the judges of probate by article 3 of chapter 19 of the Code of Alabama, and acts amendatory of any sections thereof, shall be conferred, done and performed by the chairman of the board of registrars." (Emphasis supplied)

This section provides that in the counties coming within its scope (Jefferson County only), the Chairman of the Board of registrars shall have and exercise the duties, etc., placed upon the Probate Judge by Article 3 of Chapter 19 of the Code. The Chairman of the Board of Registrars of Jefferson County is charged with the performance of the duties, etc., that in other counties are placed upon the Judge of Probate. Consequently, in my opinion he must be allowed the same reasonable expenses, etc., necessary for the performance of those duties as are allowed when the duties are performed by the Judge of Probate. See opinion to Hon. S. W. Hawkins, Chairman, Jefferson County Board of Registrars, under date of August 3, 1939, Quarterly Report of Attorney General, Vol. XVI, p. 118; *Cocper v. State*, 226 Ala. 288, 147 So. 1132; *Garner v. McCall*, 235 Ala., 187, 178 So. 210.

This office has ruled that the Judge of Probate should revise the list of qualified electors to be furnished to election inspectors at special elections to show only those qualified as of February 1st preceding such election, Biennial Report of Attorney General, 1930-32, p. 351. See also opinion to Hon. Chas. E. McCall State Auditor, under date of February 4, 1935, Office Edition of Opinions of Attorney General, Vol. 2-A, p. 55, a copy of which is hereto attached. The conclusions reached in the opinion to Judge McCall, *supra*, in regard to the duties of the Judge of Probate generally as to the special election therein dealt with (prohibition referendum) are equally applicable to your duties, as Chairman of the Board of Registrars of Jefferson County, as to the special election dealt with in your request (election to fill vacancy in office of President of City Commission of Birmingham), except as modified by the provisions of Section 1881 of the Code of Alabama, 1923, and that the clerical assistants necessary for you to perform such duties is furnished in accordance with Section 403, *supra*, and the cases above cited, rather than under the provisions of Section 402, *supra*, which govern this matter generally.

Section 1881 of the Code of Alabama, 1923, which is a part of Article 12 of Chapter 43, which deals with municipal elections generally, reads as follows:

"Section 1881. Registration list, for election for extension.—The mayor of the city or town shall cause to be made duplicate copies of so much of the registration list of the county in which city or town or any part thereof, is located, as may embrace the registered and qualified voters who reside within the corporate limits of such city or town; in cities, dividing the same into separate alphabetical lists of the registered voters of each ward. He shall have compared such copies with the original registration lists and correct the same so that they shall be accurate, and shall certify on each that it is a correct list of the registered voters for the town or ward to which it appertains. He shall have full access to all registration lists of the county for this purpose. One of each of said duplicates shall be filed with the clerk of the city or town, where it shall remain as a record of his office, and on or before the day of election, and before the opening of the polls, he shall furnish the inspectors for the respective wards or polling places with a copy of the lists of the registered voters of the ward or town for which such inspectors were appointed."

Thus, it may be seen from a reading of this section that instead of you furnishing the list of qualified electors to the inspectors in a special municipal election, the municipal authorities themselves, from the list of qualified electors of the county prepared by you in the manner hereinabove pointed out, must make their own list of qualified electors of the municipality to be furnished to the election inspectors in such special election.

The premises considered, and on the basis of the above cited authorities, it is my opinion:

1. The Chairman of the Board of Registrars of Jefferson County is required to prepare, preceding every election, an alphabetical list of qualified electors by precincts.

2. That said list must contain the names of all persons who were qualified electors as of February 1st preceding the election.

3. That the expense of preparing such list must be borne by the county.

4. That from the list of qualified electors so prepared by the Chairman of the Board of Registrars, the municipal authorities of the City of Birmingham must make their own list of qualified electors of the City of Birmingham to be furnished the election inspectors in the special election herein dealt with.

5. That no publication of the list of the qualified electors of Jefferson County required to be prepared by the Chairman of the Board of Registrars of Jefferson County, or of the list of qualified electors of the City of Birmingham required to be made therefrom by the municipal authorities, is authorized or required at this time.

In preparing this opinion, only those statutory provisions hereinabove cited have been taken into consideration, as no local laws or general laws with local application applicable to Jefferson County or the City of Birmingham bearing upon this question have been called to the attention of this office, and the statutes above cited are the only statutes which the research of this office reveals to be applicable to this question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Hon. Lee J. Clayton,
City Attorney,
Eufaula, Alabama.

February 15, 1940.

The Clerk of the Circuit Court is without authority to appropriate the fines collected in cases appealed from Municipal Courts to Circuit Courts in the payment of costs of the Circuit Courts in other cases so appealed where the defendant is acquitted.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 11, 1939, in which you request my opinion as follows:

"I am City Attorney for the City of Eufaula. At the last term of the Circuit Court here, there were several cases tried that had been appealed from the Recorder's Court of Eufaula. In some there were convictions and in some there were acquittals. The Clerk of the Circuit Court has withheld the payment to the city, or so much thereof as was necessary, from fines due the city and applied the same to the payment of costs in cases where the city lost and there were acquittals. In the cases where there were fines fixed by the Circuit Court and it was part of this money that the Clerk is undertaking to apply to payment of costs in cases where the city lost. All the cases referred to were quasi criminal cases where the city was the plaintiff.

"As City Attorney, I am writing this letter at the request adopted by the city council of Eufaula."

I find no authority of law which authorizes the clerk of the circuit court to appropriate the fines collected in cases appealed from a municipal court to the circuit court, where the defendant is convicted for violation of a city ordinance, to payment of costs in other cases so appealed, where the defendant is acquitted; but, to the contrary, I find where such clerk is required to, within thirty days, remit such fines so collected to the city treasury, and failing to do so is assessed a penalty of five per cent per month.

I call your attention to Section 1938, Code of Alabama, 1923, as amended by an act approved September 14, 1935 (General Acts, 1935, page 1107), which is as follows:

"JUDGMENTS ON APPEALS FROM RECORDER'S COURT; PROCEEDINGS THEREON—If such defendant fails to appear in the court to which an appeal was taken, when the case is called for trial, unless good cause is shown to the court for his absence or default, the court shall enter up a judgment of forfeiture on said appeal bond against the defendant and his sureties as is authorized or provided by law in criminal cases, and a new warrant of arrest may issue from the court without any other authority therefor, and the court may also, on motion of the solicitor or his assistant where the prosecution is in the name of the state, or on motion of the attorney prosecuting for the city or town where the prosecution is in the name of the city or town, or in the absence of such motion ex mero motu, dismiss such appeal. Upon the dismissal of such appeal, and by the fact of such dismissal of such appeal, the judgment of the recorder's court against the defendant shall be reinstated and become final and the clerk of such court to which such case was appealed, must, in writing, notify the mayor or other chief executive or the recorder of said city or town of the judgment of the court dismissing such appeal; Provided, however, that the court to which said appeal was taken may, on motion of the defendant made within thirty days from the date of the order of dismissal, set aside such dismissal and reinstate such appeal on such terms as the court may

prescribe, for good cause shown by the defendant for his absence or default. When such appeal has been dismissed, the Court may at any time issue a warrant, and alias and pluries warrants, against the defendant, and the defendant may also be arrested without a warrant as an escape, and when so arrested, the defendant shall be delivered to the chief of police or marshal or any policeman of said city or town and punished in accordance with the original judgment of the recorder's court, and in case the defendant appears on such appeal and judgment is rendered against him, unless the fine and costs are presently paid, or a judgment confessed therefor in favor of the city or town by the defendant, with sureties in the same manner as provided for in convictions for violating the state laws, the said court to which said appeal was taken must remand the defendant to the city or town authorities for punishment, and the clerk of such court must in writing notify the mayor or other chief executive or the chief of police of said city or town of the judgment of the court trying such case, and said notice shall accompany the defendant when he is delivered to the city or town authorities for punishment; but, if the judgment of such court is paid, the clerk of said court may receive such fine and costs and the defendant may be discharged, and such clerk must, under a penalty of five per centum per month thereon for a failure to do so, pay said money to the treasurer of the city or town, or to the officer corresponding to the treasurer thereof within thirty days after he receives it. His bondsmen shall also be liable for said penalty, and the amount thereof with the money collected may be recovered on motion after three days' notice."

Biennial Report of Attorney General, 1930-32, page 444.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 15, 1940.

Mrs. W. Lee Stanley, Clerk,
Circuit Court, Colbert County,
Tuscaloosa, Alabama.

Witness Fees—Counties—General Fund—

Funds in unclaimed witness fee fund of county, which should have been transferred as of January 1, 1939 to general fund of county under provisions of Section 7245 of Code of Alabama, 1923, not affected by Act No. 33, S. 59, approved February 16, 1939, which amended said section.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated November 28, 1939, which reads as follows:

"There is no deposit in the unclaimed witness fee fund of Colbert County, Alabama, the sum of \$511.00. This amount has been on deposit in the fund for more than 6 years and should have been transferred under section 7245 of the Code of 1923 in January of this year.

"Your opinion to Hon. H. C. Landman, Huntsville, Alabama, A. G. O. Vol. 16, page 173, deals with this section of the Act as amended but it is not stated there where the funds that should be transferred at the time the act was passed should not be transferred under the act as amended. The question is: Should these funds as stated above be legally transferred to the Fine and Forfeiture Fund, under the new Act?"

I answer your inquiry in the negative.

From the facts stated in your letter, I assume that the sum of \$511.00 on deposit in the unclaimed witness fee fund of Colbert County, Alabama should have been transferred on the first day of January, 1939, to the General Fund of said County as provided for in Section 7245 of the Code of Alabama, 1923. Said Section is as follows:

"7245. Claims presented within six years, or barred thereafter.—All persons entitled to such witness fees shall present their claims for payment to the county treasurer or custodian of county funds within six years from the date of its collection by the clerk, by presenting the witness certificate, or by filing an affidavit showing its loss and his right and title to the same, and said treasurer or custodian of county funds upon such presentation, shall pay out of said funds to the person presenting said claim the amount shown to be due him by the report filed with him by the clerk. **All claims for witness fees reported by the clerk, paid over to the county treasurer or custodian of county funds shall be forever barred after six years from the time such fees are collected and subject to disbursement, and on the first day of January of each year the treasurer or custodian of county funds shall transfer from said fund and place in the general fund of the county all such fees in his hands which are shown by the clerk's report to have been collected and subject to disbursement for six years.**" (Emphasis supplied)

The duty imposed upon the Treasurer or Custodian of County funds of Colbert County, Alabama, under the provisions of the above section, to transfer these funds to the general fund of the county on the first day of January, 1939, is in my judgment purely a ministerial duty, (See **Grider v. Talley**, 77 Ala. 422; **Anderson et al. v. State**, 20 Ala. App. 505, 103 So. 305, cert den.) and on said date the general fund of the county had a vested right in and the legal title to such funds.

Therefore, as the Treasurer or Custodian of county funds of Colbert County, Alabama was required, under the provisions of the above section, to transfer these funds to the general fund of the county on the first day of January, 1939, it is my judgment that although these funds were not transferred on said date, they should, when transferred, be paid into the general fund of the county. The fact that the Legislature, subsequent to the time that these funds were required to be transferred to the general fund, amended said section, supra, (Act No. 33, S. 59, approved February 16, 1939) by providing that unclaimed witness fees which are barred should on the first day of January of each year be transferred by the Treasurer or Custodian of County Funds to the Fine and Forfeiture Fund, would not affect the funds here under consideration.

In connection with this opinion, the case of **Blake v. State ex rel. Going, et al.**, 178 Ala. 407, 59 So. 623, has been considered. In this case there was nothing in the statement of facts to show that the witnesses could no longer assert their claims to the fees in question, hereby giving the State a vested right in and to the same, but it appears that the claims were not barred and could still be asserted by the persons entitled thereto; whereas, in the instant case the witnesses could no longer assert their claims to the fees, and the right of the general fund of the county thereto had already become vested before Section 7245, supra, was amended.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 15, 1940.

Hon. William J. Kern, Clerk,
Inferior Criminal Court,
Mobile County,
Mobile, Alabama

Costs and Fees—Warrant of Arrest—Commitment—

1. Fees for issuing warrant of arrest is taxable only where warrant of arrest actually issues.
2. No fee for issuing commitment can be taxed except where defendant is actually committed to jail without making bond.
3. All commitments to jail issued out of the Inferior Criminal Court of Mobile County should be directed to the Sheriff of that county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 14, 1939, in which you request my opinion as follows:

"Please advise me as to the following:

"No. 1. The Sheriff of Mobile County gives a person a ticket for violating a traffic law; the person comes into the docket room of the jail and is docketed by the jailer; he immediately makes bond returnable to this Court, being detained no longer than necessary to sign the bond, being not locked up in a cell although passing through two steel barred doors, both of which are locked behind him; should the

Clerk of this Court in such circumstances, issue a warrant and a commitment, for which there is a code provision for a charge of .50 for the warrant and .25 for the commitment?

"No. 2. If a State Highway Patrol officer gives a person a ticket for violating a traffic law out on the public highway, releases him immediately on his own bond to this Court, should the Clerk of this Court issue a warrant and a commitment in such a case, charging for the County the fees of .50 and .25 for the warrant and commitment respectively?

"No. 3. If a State Highway Patrol officer brings a person into this Court immediately upon arresting him for a traffic violation and without placing him under appearance bond to this Court, should the Clerk of this Court issue a warrant and a commitment charging the aforementioned fees for the County of .50 and .25 for said warrant and commitment? And if such commitment should issue, and the arrest having been made by the State officer, should the commitment issue to the Sheriff of Mobile County?"

In answering your inquiries, I am assuming that the Clerk of the Inferior Criminal Court by special legislation, has been given the authority to issue warrants of arrest and commitments.

I am also assuming that the offenses causing the arrests referred to in your several inquiries were violations of the laws of the State of Alabama and not municipal ordinances.

It is my opinion that a fee for the issuance of a warrant of arrest is not taxable except in those cases where a warrant actually issues. An officer has the authority to arrest a person for a misdemeanor committed in his presence without a warrant. This however, would not preclude such an officer from making an affidavit charging the commission of the offense and having a warrant of arrest issue thereon. In this event, it is my opinion that the fee for the issuance of the warrant of arrest would be properly taxed against the defendant. I do not believe, however, that under the facts detailed in your letter of inquiry that a fee for the issuance of a commitment should be charged merely because a person was brought into the outer part of the jail, where a case is docketed against him and he is immediately released on bond returnable to the Inferior Criminal Court of Mobile County. I do not believe that he has been in jail in the sense that a commitment should issue. The above statement answers your first and second inquiries.

In answer to your third inquiry, it is my opinion that the fee of fifty cents for issuing the warrant of arrest should be taxed, if the State Highway Patrol officer makes an affidavit charging the defendant with the commission of a crime, and a warrant issues in response to such affidavit. If the defendant is not released on bond and is ordered committed by an officer legally possessing the power to order the defendant committed to jail, then the Clerk of the Inferior Criminal Court of Mobile County can legally tax against the defendant a fee for issuing the order and commitment. Such commitment should issue to the Sheriff of Mobile County, Act No. 88, H. 489, approved October 12, 1932, Local Acts, 1932, page 34.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 15, 1940.

Hon. William W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Statutes—Election—Absentee ballots—

Provisions of Act No. 209, S. 91, approved July 28, 1939, General Acts, 1939, page 361, the so-called secret ballot act, do not apply to absentee ballots cast in any election in Alabama.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 7, 1940, in which you request my opinion as follows:

"Under Act No. 209, Senate 91, Regular Session, 1939, Section 2 of this Act provides: That at the bottom of each ballot there shall be printed a one inch square and that the inspector shall place the number inside this square. Does this apply to absentee ballots?

"In having absentee ballots printed for this County does this Act apply to same and shall the one inch square be printed on the absentee ballot as well as on the regular ballot?

"Please let me have your opinion on the above."

It is my opinion that Act No. 209, approved July 28, 1939, General Acts, 1939, page 361, does not apply to absentee ballots. This act is intended to guarantee each voter the right to vote a secret ballot, but in the passage of the act the Legislature could not have had in mind absentee ballots, for the simple reason that if the provisions of the Act were applied to absentee ballots, it would not tend to make the same secret in any respect.

I am aware that Section 1 of said Act reads as follows:

"Section 1. That every voter of Alabama shall have the right to vote a secret ballot, that ballot shall be kept secret and inviolate."

but the numbering of absentee ballots, as provided for by the 1939 act, supra, could not in any wise make said ballot secret, as under the general law the voter casting an absentee ballot is required to make a non-detachable affidavit, which affidavit discloses the name of the voter. See Section 1 of Act No. 178, S. 27, approved April 19, 1933, General Acts, 1933, page 193, governing absentee ballots which is as follows:

"Section 1. That for every general, special primary, or municipal election hereafter held in this state, there shall be printed, provided and

furnished to the Judge of Probate of the county in which such election is being held, by those charged by law with the duty of furnishing other supplies for said elections, a sufficient number of ballots to be used by absentee voters, which ballots shall bear printed thereon the words 'Official absentee ballot,' and which said ballots, bearing said printed endorsement, shall also carry, attached thereto and forming a non-detachable part thereof, the printed form of affidavit required by section 410 of the Code of Alabama of 1923, if the election be a general, special or municipal election, or by section 682 of said Code, if the election be a primary election. The said ballot shall be void and shall not be counted if the said affidavit is detached therefrom."

It can be seen from the above that to number an absentee ballot would not in any wise make such ballot secret, as at the bottom of the same appears the attached affidavit setting out the full name of the voter.

Consequently, I am of the opinion that in the passage of Act No. 209, supra, the Legislature never intended that it apply to absentee ballots, the numbering of which, in the manner there provided, could serve no purpose. To hold otherwise would be to convict the Legislature of having done a useless and futile thing.

Even though Section 1, supra, does give every voter the right to cast a secret ballot, it does not require that he cast a secret ballot, and if he avails himself of the privilege of casting an absentee ballot, he simply forfeits the right granted to him by Act No. 209, supra, in regard to the secrecy of his ballot.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 16, 1940.

Hon. O. L. Andrews, Clerk,
Circuit Court, Jefferson County,
Birmingham, Alabama.

Department of Public Safety—Highway Patrol Officers—

Witness Fees—

State Highway Patrol Officers entitled to same mileage for attendance on court as are other witnesses, to be collected by the proper authorities and promptly turned over to the Director of Public Safety to be covered by him into the Highway Patrol Fund.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 7, 1940, in which you request my opinion as follows:

"In the General and Local Acts 1936-1937, page 188, is an Amendment to an Act of September 2, 1935, with reference to State Highway Commission, among other things provides:

"No State Highway Patrol Officer shall be entitled to any costs for attending courts but instead, the proper authorities shall collect such fees and mileage that are due such officers for attendance on any court or for any official act and to promptly turn same into the Highway Patrol Fund, and it shall become a part thereof, such fees and mileage to be expended as other moneys in said fund are authorized to be expended, Provided, however, that allowance for mileage shall be expended, Provided, however, that allowance for mileage shall be limited to the actual number of miles traveled and shall in no case exceed 25 miles.'

"House Bill 245 Regular Session 1939 which was approved March 18, 1939, and became effective September 30, 1939, substantially reads as the above paragraph except there is no mention of limitation of mileage to officers and agents.

"Please inform me at your earliest convenience if this Act repeals the Act before mentioned and if Officers and Agents of the State Highway Patrol Fund are entitled to mileage as other witnesses."

It is true that under the provisions of Section 11 of the original Drivers' License Law or Highway Patrol Act, as amended by Act No. 165, H. 105, approve March 2, 1937, (General Acts, 1936-37, page 188), the total allowance for mileage to members of the State Highway Patrol for attendance upon court was limited to twenty-five miles. The pertinent portion of said Section 11, as amended, reads as follows:

" * * * provided, however, that no State Highway Patrol officer shall be entitled to any costs for attending any courts, but instead, the proper authorities shall collect such fees and mileage that are due such officers for attendance on any court or for any official act and Fund, and it shall become a part thereof, such fees and mileage to be expended as other moneys in said fund are authorized to be expended. Provided, however, that allowance for mileage shall be limited to the actual number of miles traveled and shall in no case exceed twenty-five miles. * * * "

See opinion to Hon. O. L. Andrews, Clerk, Circuit Court, Jefferson County, Birmingham, Alabama, under date of May 4, 1939, Quarterly Report of Attorney General, Vol. XV, page 89.

However, the original Drivers' License Law or Highway Patrol Act, as amended, was superseded by Act No. 181, H. 245, approved March 18, 1939, and effective September 30, 1939, (General Acts, 1939, page 300). This latter act is an entire rewrite of, and covers the whole subject of, the original Driver's License Law or Highway Patrol Act, as amended. Section 13 thereof reads in pertinent part as follows:

" * * * provided, however, that no State Highway Patrol Officer shall be entitled to any costs, fees or mileage for attending any courts, but instead, the proper authorities shall collect such costs, fees and mileage that are due such officers for attendance on any courts or for any official act and promptly turn the same over to the Director of Public Safety who shall cover the same into the Highway Patrol Fund, and it shall become a part thereof, such costs, fees and mileage to be expended as other moneys in said fund are authorized to be expended. * * * ";

and Section 18 thereof, which contains the repealing clause, reads as follows:

"Section 18. That the Act entitled 'An Act to provide for the Public Safety; to regulate the operation of motor vehicles on the public highways; to provide for the registration and licensing of drivers or operators of motor vehicles and to fix the fees therefor. To authorize the State Highway Commission, with the approval of the Governor, to establish and promulgate reasonable rules and regulations concerning the operation of motor vehicles; to provide punishment and penalties for the violation of the provisions of this Act and of the rules and regulations authorized hereby; to provide for the suspension and revocation of drivers' licenses issued; to authorize the appointment or employment of the necessary officers and agents, and the purchase of the necessary equipment to make the provisions hereof effective; and to provide for the compensation of the officers and agents so employed,' approved September 2, 1935, and all laws and parts of laws in conflict herewith be and the same are hereby repealed."

It is to be noted from the above quoted excerpt from Section 13 of the latter act that the twenty-five mile limitation contained in Section 11 of the original Drivers' License Law or Highway Patrol Act, as amended, *supra*, is omitted.

In my opinion, the omission of this limitation in the latter act operates as a repeal thereof, and, consequently, it is my judgment that the State Highway Patrol Officers are now entitled to the same mileage for attendance upon court as are any other witnesses, to be collected by the proper authorities and promptly turned over to the Director of Public Safety to be by him covered into the State Highway Patrol Fund.

Where the provisions of a statute cover the entire subject matter of a former statute and are clearly intended as a substitute for all the provisions of the former, the former statute is repealed, regardless of the inconsistency or repugnancy of the statutes. *State v. Kirkpatrick*, 19 Ala. App. 50, 95 So. 490 certiorari denied, 209 Ala. 16, 95 So. 494, and cases collated in 18 Alabama Digest, 112, Statutes, Key No. 161 (1).

The premises considered, the opinion rendered to Hon. O. L. Andrews, *supra*, is no longer applicable.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 16, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Schools—County boards of education and consolidated city and county boards of education, under the general law, may legally expend revenues from their respective general funds for the purchase of certificates of graduation and/or diplomas for students.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 18, 1939, requesting my opinion as follows:

“Will you please advise me in answer to the following:

“1. Can a County Board of Education or consolidated County and City Board of Education legally expend any school funds for the purchase of certificates of graduation for the students?

“2. Can a County Board of Education or consolidated County and City Board of Education legally expend any school funds for the purchase of diplomas for the students?”

In answer to your inquiry, it is my opinion that county board of education and consolidated city and county boards of education, under the general law, may legally expend monies from their respective general funds for the purchase of certificates of graduation and/or diplomas for students. There are a number of boards of education which operate under special or local acts, and in such instances these acts should be taken into consideration. This opinion deals only with those boards which function under the general law. Of course, in instances where the power and authority of certain boards of education, operating under special or local acts, is the same as, or broader than, that granted under the general law, this opinion will be applicable.

Section 78 of the School Code of 1927 provides as follows:

“78. Grading and Standardizing Schools.—The State Superintendent of Education shall prepare, or cause to be prepared, and submit for approval and adoption by the State Board of Education, rules and regulations for grading and standardizing all public schools of an elementary and high school grade, also for limiting on the basis of equipment and number of teachers employed, the years and grades of instructions that may be offered in such schools, but such rules and regulations shall not be inconsistent with the provisions of this code or any other statute of this State. He shall also prepare, or cause to be prepared, and submit for approval and adoption by the State Board of Education, **the minimum requirements for issuing all certificates and diplomas in such schools.**” (*Italics supplied*)

The above quoted section authorizes, by necessary inference, if not directly, the issuance of certificates and diplomas to students who meet the necessary requirements.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 17, 1940.

Hon. R. B. Carr, Judge,
Seventh Judicial Circuit,
Anniston, Alabama.

Court Reporters—Official court reporter in judicial circuits presided over by two circuit judges held required to serve any judge calling him, when not actually engaged in performing duties for another judge.

Compensation—Official court reporter serving either court of circuit presided over by two circuit judges during illness of second official court reporter held not entitled to additional compensation or expenses for such service.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 26, 1940, in which you request my opinion as follows:

"Section 6737 of the Code of Alabama provides:

"Special reporter; appointment of.—Should the official court reporter herein provided for, on account of sickness or other cause, be unable to report the testimony of any trial as provided in this article, the judge of the court may appoint a special reporter to serve until the official court reporter can resume his duties in such court, the compensation of such special reporter to be the same and paid in like manner as herein provided for official court reporters. In circuits having two or more judges, the court reporter shall, when not engaged in the discharge of his official duties, be subject to the direction of any judge of such circuit, it being the intention and purpose of this provision to avoid the necessity of appointing a special reporter whenever any official court reporter of the circuit is available."

"There are two court reporters in the Seventh Judicial Circuit; Hugh V. Fitzgerald is my reporter and Dalton Swann is Judge Lamar Field's reporter. A few weeks ago Mr. Fitzgerald was ill, and it was necessary

for me to secure the services of a court reporter to report cases I was trying in Talladega County. Mr. Swann reported these cases for me, Judge Field at the time not being engaged in the trial of jury cases, but did have equity matters set for hearing during the period, which he continued to a later date, and Mr. Swann then had transcript work requiring his attention, but this also was deferred. Mr. Swann incurred personal expenses on his trip to Talladega which otherwise he would not have had. I am very anxious to pay him for this additional service. I am, therefore, asking you to let me know whether or not I am authorized under the above section to allow him the compensation provided in said section."

In reply, I wish to advise that it is my opinion that your question must be answered in the negative.

In my judgment, Section 6737 of the Code of 1923, cited by you, does not authorize the payment outlined in your request.

Mr. Swann is a court reporter for the Seventh Judicial Circuit regardless of the fact that his work is primarily for Judge Field. Mr. Swann is employed as such reporter subject to the call of either of the Circuit Judges of the said Seventh Judicial Circuit, and is not entitled to any additional compensation for such services, even though the work being performed is that which is ordinarily assigned to the other court reporter at the time incapacitated because of illness.

I wish to refer specifically to the following provision of the law cited by you:

"In circuits having two or more judges, the court reporter shall, when not engaged in the discharge of his official duties, be subject to the direction of any judge of such circuit, it being the intention and purpose of this provision to avoid the necessity of appointing a special reporter whenever any official court reporter of the circuit is available."

The purpose of the statute which makes provision for the appointment of the named court reporter sets out the intention of the Legislature as "it being the intention and purpose of this provision to avoid the necessity of appointing a special reporter whenever any official court reporter of the circuit is available."

The premises considered, it is my opinion that no additional compensation may be paid to Mr. Swann under your statement of facts.

The fact that Mr. Swann incurred certain expenses in making the trip to Talladega to report the testimony as outlined by you, cannot, in my judgment, be considered. The official duties of the court reporter, as contemplated by the above quoted statutes, provide compensation which, in my judgment, must include the expenses named.

I wish to refer you to an opinion of the Attorney General addressed to Hon. Henry Foster, Judge, Sixth Judicial Circuit, Tuscaloosa, Alabama, under date of October 25, 1939, which opinion is directly in point, but is related in some respects to the matters herein discussed. A copy of this opinion is enclosed for your convenience.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 17, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Schools—Bibb County—

Claims for mileage and traveling expenses of County Superintendent of Education under Act No. 384, H. 630, approved September 13, 1939 (Local Acts, 1939, p. 251, Pamphlet), need not be sworn to, but must be itemized so as to show the number of miles traveled and the dates and places in question.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 12, 1940, in which you request my opinion as follows:

"Will you please refer to Act No. 384, House Bill 630, by Mr. Wood, approved by the Governor on September 13, 1939, and advise me in answer to the following:

"1. Do the monthly claims of a Superintendent of Education for traveling allowance have to be itemized as to the number of miles traveled, showing the dates of the trip and the points or places traveled to and from, and do they have to be sworn to?

"(In answering the above question, please advise me which, if any, of the items mentioned do not have to be shown on the claims.)"

Section 1 of Act No. 384, H. 630, approved September 13, 1939, (Local Acts, 1939, p. 251, Pamphlet) referred to in your inquiry, provides as follows:

"Section 1. The Superintendent of Education of Bibb County, Alabama, shall be allowed five cents for each mile traveled by him within the State of Alabama in the discharge of his official duties as such Superintendent of Education. The mileage and traveling expenses hereby allowed shall not exceed the sum of One Thousand Dollars in any calendar year, and the same shall be paid out of the County School Funds of Bibb County, Alabama, on warrants drawn by the Custodian of the County School Funds of Bibb County, Alabama, in monthly installments. For the purpose of determining the amount of each monthly installment herein provided for, the said Superintendent of Education shall execute and deliver, during the first week of each month, to the Custodian of the County School Funds of Bibb County, Alabama, his account showing the number of miles traveled by him during the calendar month next preceding that date in the discharge of his official duties." (Emphasis supplied)

In an opinion of this office rendered to the Superintendent of Education of Bibb County on February 10, 1939, construing the above, it was held

that the claims of the County Superintendent of Education of Bibb County for mileage and traveling expenses need not be certified to, but that proper evidence should be presented showing that the mileage was actually traveled, as provided in the act, before reimbursement could be had. In this respect reference is made to the emphasized portion of the above quoted section. It will be noted that "an account" must be presented.

To constitute "an account" the various items must be stated in detail, so that a person having the right thereto will have information which will enable him to make some reasonable test of its accuracy and honesty, and hence it is insufficient merely to state a general balance.—1 *Corpus Juris Secundum* 572; 1 *Corpus Juris* 596; *Morrisette v. Wood*, 128 Ala. 505, 30 So. 630.

Applying the above to your inquiry, it is my opinion that claims do not have to be sworn to, but that they should be itemized as to the number of miles traveled, the dates of the trips and the points or places traveled to and from.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 17, 1940.

Hon. O. C. Bottoms,
Superintendent of Education,
Etowah County,
Gadsden, Alabama.

Etowah County—Act No. 45, H. 85, approved February 24, 1939 (Local Acts 1939, p. 18, pamphlet), not violate of Section 105 of the Constitution of 1901.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated February 2, 1940, which follows:

"Under a general act in the School Code, Section 138, it is provided that there shall be a county superintendent of education in each county of this state and that he shall be appointed by the County Board of Education. Section 105 of the Constitution provides that no special, private or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law. In 1939 a local act was enacted by the legislature providing that the county superintendent be selected by popular selection in Etowah County.

"In your opinion, is this local act in violation of Section 105 of the Constitution of Alabama?"

My answer to your inquiry is in the negative.

The act about which you inquire is Act No. 45, H. 85, approved February 24, 1939 (Local Acts, 1939, p. 18, pamphlet), and reads in part as follows:

"AN ACT To provide for a special election to be held in Etowah County, Alabama, to determine whether the County Superintendent of Education shall be elected by the qualified electors of Etowah County; to provide, in event said election carries, for the time and manner of his election, and to fix his term of office and prescribe his qualifications.

"Be it enacted by the Legislature of Alabama:

"Section 1. That on the date of the first general election, constitutional amendment election, or other county-wide election open to all of the qualified electors of Etowah County which is held in Etowah County, Alabama, after the passage and approval of this Act, there shall be held in Etowah County, Alabama, a special election for the purpose of determining whether the County Superintendent of Education for said County shall be elected by the qualified voters of said County or whether the County Board of Education of said County shall continue to appoint the County Superintendent of Education for said County.

"Section 5. If a majority of those voting in said special election favor the election of the County Superintendent of Education of Etowah County by the qualified electors of said County, then at the first general election held after the special election herein provided for and every four years thereafter a County Superintendent of Etowah County, Alabama, shall be elected by the qualified electors of said County, who shall take office on the 1st day of July next following his election and who shall serve for a term of four years and until his successor has been elected and qualified. Prior to such general elections political parties may be primary, convention or otherwise nominate candidates for County Superintendent of Education in the same manner as candidates for other County offices are nominated."

The Supreme Court in the case of *State ex rel Austin v. Black*, 224 Ala. 200, 139 So. 431, considered and construed an act similar in language, and in my opinion of the same legal effect in so far as Section 105 of the Constitution of 1901 is concerned, to the Act under consideration. The Act considered in the Black case, *supra*, reads in part as follows:

"To provide for the election of a County Superintendent of Education for Geneva County, Alabama, to fix his term of office, to prescribe his salary, and the manner of payment, to define his qualifications, powers, and duties, and to provide for the election of his successor in office.

"Be it Enacted by the Legislature of Alabama:

"Section 1. That a County Superintendent of Education for Geneva County, Alabama, shall be elected by the qualified electors of Geneva County, Alabama.

"Section 2. That immediately after the passage of this Act, a special election shall be called, by the Probate Judge of Geneva County, and held in Geneva County, Alabama, the expenses thereof to be paid out of the general funds of said County, for the purpose of electing a County Superintendent of Education for said County, by the qualified electors thereof, who shall assume the duties of his office July 1, 1931, and shall hold office until his successor is elected and qualified, at the General Election to be held, on the Second Tuesday in November, 1934, at which time his successor in office shall be elected, and thereafter the Superintendent of Education of Geneva County, shall be elected quadrennially, and hold office for a term of four years, unless removed for good cause, nominations for this office shall be made in the Primary Elections as provided for the other County offices."

The Court, in the Black case, *supra*, after considering other questions involved in the case, said:

"We are therefore of opinion and so hold that the act in question is not offensive to sections 45, 96, 105 and 106 of the Constitution, nor to subdivision 24 of Section 104 of the Constitution of 1901."

It is therefore my opinion, based on the authority of the Black case, *supra*, that the act under consideration is not violative of Section 105 of the Constitution of 1901.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 17, 1940.

Hon. G. W. Cuninghame, Register,
Marengo County,
Linden, Alabama.

Banks and Banking—Exchange—

Exchange charges by state bank on checks drawn on other banks is a legal charge—warrants, bonds of state and county or other political subdivision thereof excepted.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of January 19, 1940, in which you request my opinion as follows:

"Re: County Depository.

"As Register of this County, the Board of Revenue of the County designated the First Bank of Linden as the Bank in which I am to deposit funds as Register, and I am using this Bank, but I find it is charging exchange on all checks given by me as Register on out of town Banks, and I want you to advise me whether or not this is legal charge. You will please advise me about this at your earliest convenience, as I now hold an out of town check for about \$4000.00 and the exchange at the rate charged by the Bank here will amount to five dollars."

It is my opinion that your inquiry must be answered in the affirmative.

The custom and usage of state banks charging exchange on checks drawn on other banks and paid by them is of old standing. It is a service charge for the collection of a check.

On February 23, 1937, the Legislature passed Act No. 134, S. 59, General Acts, 1936-37, page 150, making state banks instrumentalities of the State and imposing upon them certain duties. This act is as follows:

"An Act to declare all banks incorporated under the laws of Alabama to be instrumentalities of the State of Alabama, and to require such banks to perform certain specified service for the State and its subdivision in addition to all other duties now required of them.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That all banks incorporated under the laws of Alabama are hereby declared to be instrumentalities of the State. As such they are hereby required, in addition to all other duties now required of them, to perform for the State, and its subdivisions without charge the following services: (a) The handling and collection (or credit at the option of such bank) of all warrants issued by the State of Alabama, or by any county or other political subdivision thereof; (b) The handling and collection (or credit at the option of such bank) of all bonds and interest coupons thereto issued by the State of Alabama or any county or other political sub-division thereof; (c) Serve as paying agent for the State of Alabama when so requested by the State Treasurer.

"Section 2. It is the Legislative intent in passing this Act to relieve State banks from any duty, obligation, responsibility or liability imposed upon them by what is known as the Unemployment Insurance feature of the Social Security Act, State and Federal, but nothing herein shall be construed to relieve such banks from any duty, responsibility, liability or obligation imposed upon them under any other State law now existing or that may be hereafter enacted.

"Section 3. This Act shall be effective upon its passage and approval.

"Approved February 23, 1937."

This office held in an opinion to Hon. B. P. Singleton, Chief Examiner of Public Accounts, under date of June 20, 1939, Quarterly Report of Attorney General, Vol. XV, page 304, that under the provisions of this act a state bank is without authority to charge the State or a county exchange or handling charges for collecting and handling State or county warrants. For your convenience, I am enclosing a copy of this opinion.

I know of no limitations on the authority of state banks, other than that hereinabove set out, to charge exchange on checks drawn on other banks.

Therefore, it is my opinion that the First Bank of Linden, which is a State bank, may legally charge exchange on checks drawn on other banks, except as limited by the 1937 act, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 17, 1940.

Hon. O. S. Nichols,
Tax Assessor, Perry County,
Marion, Alabama.

Taxation — Municipal Taxes — Assessment by County Tax Assessor—

A municipal corporation electing to adopt the provisions of Act No. 57, H. 183, approved February 27, 1939, for assessment and collection of its property taxes must (1) adopt resolution or ordinance to that effect, and levy tax in May for year beginning October 1, thereafter, and (2) deliver copy of said resolution or ordinance to County Tax Assessor on or before June 1 next thereafter. Acts, 1939, page 67; Acts, 1931, pages 337, 338, Sections 3, 6.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for an official opinion dated February 10, 1940, which reads as follows:

"Will you please give us an official opinion at the very earliest date regarding the time in which the City of Marion must notify the State and County Tax Assessor that the City of Marion is turning over to the County Tax Assessor the authority to begin assessing taxes for the City for the year 1941 which begins on October 1, 1940.

"Now the point that we are interested in, and want you to clear up for us is, under the law how later in the year 1940 can the City authorities

wait to officially notify the County Tax Assessor that they are turning over to him the City Assessments for the year 1941 for him to make assessments for the City of Marion along with the State and County assessments for 1941, which assessments start on the first day of October, 1940.

"We Tax Assessors throughout the State have to have our Tax Assessment forms that are to be used for the year 1941 beginning October 1, 1940, made up and delivered to us not later than July of 1940, in order that we can write up our books of assessments for each taxpayer in each beat or district and for the entire county in order that we will be ready on October 1, 1940 to begin making our assessments for 1941.

"As above stated, in order for us to be ready we have to place our order for forms to be made up early in the year to be able to be ready for the assessments, and it would not be fair, and it would be utterly impossible for us Tax Assessors to handle the 1941 Assessments for the City unless they had officially notified us of the fact before we placed our order for 1941 assessment forms, which order has to be placed not later than May of the year 1940 in order that we can be assured of them some time in June and not later than early in July, because if we had not been notified then our sheets would not take care of the City assessments for that year, as we would have to change our assessment forms if we have been notified in time so that we could assess the City taxes in addition to the State and County.

"This is a very important matter so please give this your undivided attention and set a time limit early enough that the City notify us so that we will not be delayed in placing our order for assessment forms."

Your request is best answered by reference to Sections 3 and 6 of Act No. 300, H. 864, approved June 26, 1931, appearing on pages 337 and 338 of the General Acts of 1931, reading as follows:

"Section 3. It shall be the duty of the council, board of commissioners, or other governing body of such cities during the month of May, 1932, and hereafter during the month of May of each year, by resolution or ordinance, to levy a tax on the property situated in such cities for the next succeeding tax year at a rate in no event in excess of the constitutional limit authorized to be levied by such cities on the value of such property as assessed for State taxation as shown by the books of assessment for the State and County tax year ending the 30th day of September next succeeding the levy. The levy so made by the council, board of commissioners, or other governing body of such cities shall go into force and effect as of the 1st day of October next succeeding the levy and shall become a lien only on the 1st day of October next succeeding such levy. After such levy is made it shall be the duty of the Mayor or presiding officer or clerk or other clerical officer of such cities on or before the 1st day of June next succeeding the levy to certify and deliver to the Tax Assessor of such County in which such cities are situated a copy of the resolution or ordinance passed by such city council, board of commissioners or other governing body in and by which taxes are levied for such cities for the next succeeding tax year commencing on the first day of the next succeeding October, provided in case such city council, board of commissioners or other governing

body shall fail any year after the year 1932 to make such levy and give such notice then the levy for the preceding year shall be continued and the taxes shall be assessed in accordance with such levy."

"Section 6. It shall be the duty of the tax assessor of each and every county in which such cities are situated on and after the 1st day of October, 1931 to show on the assessment list made or taken by him under the provisions of law as now applicable to State and County taxes what property, if any, described in the lists, is situated within such cities, and the assessor shall ascertain the value of each item, or subject of taxation, situated in such cities separately from the value of each item not within such cities in such a way as to make of easy ascertainment the assessed value of property within such cities."

The act above referred to, at the time of its passage and approval, only applied to cities having a population of not less than 6500 nor more than 15,000 inhabitants.

By Act No. 57, H. 183, approved February 27, 1939 (Acts 1939, page 67) the provisions of the Act of June 26, 1931, supra, as to assessment and collection of municipal taxes by county officials in all cases where a municipal corporation has by ordinance or resolution elected to avail itself thereof, are made applicable.

In such cases, therefore, the governing body of the city or town must during the month of May, by ordinance or resolution, levy the municipal tax for the year beginning October 1 next thereafter, to be based on the assessments for State and County taxes for the year ending September 30. **A certified copy of such resolution or ordinance must be delivered to the County Tax Assessor on or before June 1.**

Whereupon, it is the duty of the Tax Assessor on and after October 1 to show on the assessment list, separately, the property subject to municipal taxation and the value of each item thereof separately in such way as "to make of easy ascertainment the assessed value of property within such cities," (and towns).

It remains to be added that preliminary to the adoption of the ordinance or resolution making the levy, or as a part thereof, the municipal governing body should by appropriate action, pursuant to the aforementioned Act of February 27, 1939, provide for the assessment, equalization and collection of municipal taxes by the county officers and boards and for compensation to the tax assessor and collector, not to exceed one-half of one per cent for collection.

You are referred, for further discussion of this subject, to the opinions of the Attorney General rendered July 11, 1939, to Hon. H. E. Kendrick, Tax Collector, Dallas County, and May 27, 1939, to Hon. J. Collier Merrill, Tax Collector, Covington County, in the Quarterly Reports of the Attorney General, Vol. XVI, at page 23, and Vol. XV at page 231, respectively.

Copy of an opinion to J. E. McAdory, rendered on November 16, 1939, is herewith enclosed. This latter opinion is direct answer to your inquiry.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 17, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Corporations—Receiverships—Franchise Tax—Permit Fees—

Domestic corporations in receivership are liable for permit fees and franchise tax pending receivership.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for an official opinion dated February 10, 1940, which follows:

"There is a corporation incorporated under the laws of the State of Alabama which voluntarily went into a receivership in 1936. In the decree appointing the receiver it was stated that a named individual was appointed Receiver:

"With the power of a receiver in equity. * * * (the) receiver is * * * ordered and directed to take over all the assets and properties * * * (of the corporation) to collect any and all collectible moneys as rapidly as such can be done * * *; said named receiver is directed to join in, become a party to, and assist in all litigation pending or which may be deemed advisable * * *; he is directed to collect all the assets of said corporation and convert the same into cash as expeditiously as he may deem advisable, and at the termination of all litigation, whether pending at this time, or hereafter instituted, and after the collection of all collectible assets of the corporation, said receiver is directed to wind up and dissolve the corporation and distribute its assets to the lawful holders of its stock, after the payment of its debts and the expenses of its dissolution and administration; * * *

"The receivership proceedings is still pending in court in accordance with the above decree.

"Will you kindly give me your opinion as to whether said corporation is liable for domestic corporation permit fee and domestic corporation franchise tax."

It is well settled law in this, as well as other states, that the appointment of a receiver does not work a dissolution of a corporation or affect its liability for taxes. *Railroad Commission v. Alabama Great Southern R. R. Co.*, 185 Ala. 354, 64 So. 13; *State v. Bradley*, 207 Ala. 677, 93 So. 595, 26 A. L. R. 421; *State v. Youngstown Mining Co.*, 219 Ala. 178, 121 So. 550; *Ex Parte Tyler*, 149 U. S. 164, 182, 43 S. Ct. 785, 37 L. Ed. 689.

The Supreme Court in the case of *State v. Bradley*, 207 Ala. 677, 93 So. 595, passed on the identical question propounded in your request, in so far

as the franchise tax is concerned. In that case the State of Alabama sued Lee C. Bradley, as receiver of the Birmingham Railway Light & Power Company, a domestic corporation, to recover the amount of franchise tax which had accrued pending receivership. The court, after discussing other questions involved in the case, said:

"The subject of the creator's imposition of this 'franchise tax' is the existence of the corporation, not the 'continued exercise of the corporate franchise.' *K. C., M. & B. R. Co. v. Stiles* 182 Ala. 138, 142, 62 South, 734, 735; *Id.*, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176. A domestic corporation not excepted by the Constitution cannot avoid or escape this 'franchise tax' by even complete corporate inactivity. The nature and subject of the imposition of this 'franchise tax,' as defined in the *Stiles* case, *supra*, discriminates the case under review from the act of Congress considered in *United States v. Whitridge*, 231 U. S. 144, 34 Sup. Ct. 24, 58 L. Ed. 159; the act there involved imposing the charge, an excise tax, upon the 'doing of business' by the corporation as measured by a described net income, an exaction materially different from Alabama's 'franchise tax,' which, as stated, **is imposed upon corporate existence, not corporate activity or exerted corporate function**, *E. C., M. & B. R. Co. v. Stiles*, 182 Ala. 138, 142, 62 South, 734; *Id.*, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176." (Emphasis supplied)

In the *Bradley* case, *supra*, the court, after holding that the funds of the corporation were liable for the payment of the franchise tax, said:

"To conclude otherwise would involve sanction of the proposition that, though imposed by Constitution and statute upon all domestic corporations (not excepted), a 'franchise tax' might be avoided by the creation of a receivership."

It, therefore, affirmatively appears that a domestic corporation may not escape the payment of franchise tax pending receivership.

I am of opinion that a domestic corporation in receivership is also liable for the annual corporation permit fee imposed by Section 316 of the Revenue Act of 1935.

The following statement is found in the *Bradley* case, *supra*:

"It is the manifest duty of a receiver of an existing domestic corporation to satisfy out of the funds in the receiver's hands all valid taxes or **governmental impositions in that nature** imposed by the corporation's creator that would have been demandable of the corporation had the receivership not been created. In *re U. S. Car Co.*, 60 N. J. Eq. 514, 516, 517, 43 Atl. 673." (Emphasis supplied)

It appears from Section 316 of the Revenue Act of 1935 that the corporation permit fee imposed thereby is not imposed primarily on the right of the corporation to do business. The fee is also imposed for the purpose of registration, to prevent the duplication of names, and in order to secure public records, for taxation, the names and addresses of the corporation and the individual officers thereof. This fee is, in my opinion, a governmental imposition in the nature of a tax imposed by the corporation's creator (the

State of Alabama), and under the authority of the Bradley case, *supra*, it is the duty of the receiver of a domestic corporation to pay such governmental impositions, and the funds of the corporation are liable for the payment of such permit fees.

The opinion of this office rendered to Hon. J. H. Williams, Superintendent of Banks, under date of February 6, 1935, Book 2-A, page 101, Office Edition, in so far as said opinion is in conflict with this opinion, is hereby expressly overruled and withdrawn.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 17, 1940.

Hon. J. Foster King,
Sheriff, Tuscaloosa County,
Tuscaloosa, Alabama.

Bail—Bondsman, surety or bail does not have the right to return a defendant or principal, against his will, from another state.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion of recent date, which reads as follows:

"Please advise me if a Bondsman has the right where bond forfeited to bring a man from another state, or across State line without requisition."

In my opinion, your question should be answered in the negative.

Under the common law, the sureties on a bail bond could arrest the principal or defendant in another state, and return him to the state where the bond required his presence, without extradition.

The right of the sureties to recapture the principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond. Extradition can only be exercised by a government. Surrender by bail can be exercised only by the person in bail. The remedies are separate and distinct.—*Taylor v. Traitor*, 16 Wall. 366, 21 L. ed. 287; *In re: Von Der Ahe*, 85 Fed. 959; *Fitzpatrick v. Williams*, 46 Fed. (2) 40; 8 *Corpus Juris Secundum*, subsection (c); 6 *Corpus Juris* 1044, note (6); 73 A. L. R. 1365.

In Alabama the common law rule has been abrogated by the legislative enactments relative to bail.

Sections 3384 and 3385 of the 1923 Code of Alabama provide respectively as follows:

"3384. Bail discharged by surrender of principal; may arrest, or authorize arrest, of principal.—Bail may, at any time before a conditional judgment is rendered against them, exonerate themselves by surrendering the defendant; and for that purpose they may arrest the defendant on a certified copy of the undertaking at any place in the state, or may authorize another person to arrest him by an indorsement in writing on such copy." (Emphasis supplied)

"3385. Arrest by bail after conditional judgment.—After the rendition of conditional judgment against them, bail may arrest the defendant as provided in the preceding section; but such arrest and delivery of the defendant to the sheriff shall not exonerate the bail unless, in the judgment of the court, a good and sufficient excuse is given for the failure of the defendant to appear at the time the conditional judgment was rendered."

In the case of *Gray v. Strickland*, 163 Ala. 344, 50 So. 152, Mr. Justice Anderson in construing Sections 6351 and 6352 of the 1907 Code, which were brought forward in the 1923 Code of Alabama as Sections 3384 and 3385, said:

"Therefore, under the statute, the sureties have the right to procure their discharge by surrendering the principal at any time before a default, just as they had under the common law; the only change being that the arrest must be made upon a certified copy of the bond. The statute does not give any additional rights or powers, but really qualifies the common law right of arrest, and the method, as prescribed by the statute must be exclusive. It gives no additional right to arrest, and cannot be said to be in aid of or cumulative to the common law in this particular, and, to give it any meaning or operation whatever, it must be construed as confining the right of arrest by the sureties in the manner therein required. To hold otherwise would render the statute meaningless as to the requirement in making arrest, and in effect stultify the lawmakers.—*David v. Levy & Son*, 119 Ala. 241, 24 South. 589."

See also *Nicholson v. Kilpatrick*, 188 Ala. 258, 66 So. 8.

From reading Sections 3384 and 3385, supra, it is my opinion that a bondsman, surety or bail may arrest the defendant or principal on a certified copy of the undertaking at any place in the state, but may not pursue him out of the state and arrest him, as the wording of the sections, supra, expressly restricts the arrest of the defendant to the bondsman, surety or bail to any place within the State of Alabama.

It, therefore, follows that your inquiry must be answered in the negative. The question of return under a requisition in such a case does not enter into this matter, since, as pointed out above, only the sovereign may exercise the power of extradition and the sovereign is not interested in this matter. No bondsman, surety, or bail could issue a requisition or exercise the power of extradition.

Of course, this does not mean that the state may not extradite such a person for the purpose of placing him on trial for the crime with which he is charged, if it elects to do so.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 17, 1940.

Hon. J. R. White,
Chairman, Board of Revenue,
Walker County,
Jasper, Alabama.

Counties—County governing body not authorized to expend any funds of the county for the erection of a private home for individual or individuals.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

My opinion has been requested as to the legality of the following resolution passed by the Board of Revenue of Walker County, Alabama, of which you are Chairman:

“WHEREAS, quadruplets, namely, Faith, Hope, Charity, and Franklin were born to Mr. and Mrs. Clyde Short, and

“WHEREAS, the said parents are not financially able to furnish the said quadruplets with necessary and proper hospitalization, home and medical care, and

“WHEREAS, the conditions, atmosphere and environment of the home in which said quadruplets were born are not conducive to the welfare and health of said quadruplets,

“NOW BE IT RESOLVED, that the Board of Revenue of Walker County, Alabama, offer immediate financial assistance for the needs of said quadruplets relative to their proper care, maintenance and support, the amount of said financial assistance and the terms of furnishing same to be fixed by this board.

“BE IT FURTHER RESOLVED, that the Board of Revenue of Walker County, Alabama, furnish a temporary home for said quadruplets, their parents and the remaining children until a permanent residence can be erected for them.

"BE IT FURTHER RESOLVED, that the Board of Revenue of Walker County, Alabama, does hereby offer to said quadruplets, their parents and the remaining children, a permanent residence at such location in Walker County, Alabama, as may be designated by the proper parties representing said quadruplets and to assist them in any way possible in setting up and maintaining proper living conditions in their said permanent residence.

"Be IT FURTHER RESOLVED, that the approval of the said parents and the legal guardians be secured prior to the giving of such assistance as aforesaid."

It is my opinion that the expenditure of any funds of the county for the purpose set forth in the resolution would be without authority of law.

An administrative board or other agency, the creature of legislation (such as the Board of Revenue of Walker County), has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a "thus saith the law" for every disbursement. Unless a given charge is expressly or impliedly authorized, it cannot be lawfully incurred. **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235.

Section 6755 of the Code of Alabama, 1923, as amended, which deals generally with the power and authority of county governing bodies, and the other provisions of the general laws of this State dealing with the power and authority of county governing bodies, have been carefully considered, and fail to reveal a "thus saith the law" for such an expenditure of county funds as that contemplated by the resolution of the Board of Revenue of Walker County, which would amount to nothing more nor less than an expenditure of county funds for the benefit of private individuals. Nor has any local statute applicable to Walker County only, which would authorize such an expenditure, been called to my attention.

If there was statutory provision for such an expenditure, it would very probably be unconstitutional as violative of Section 94 of the Constitution of 1901, which reads as follows:

"94. The legislature shall not have power to authorize any county, city, or town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

See **Stone v. State ex rel Mobile Broadcasting Co.**, 223 Ala. 426, 136 So. 427, and authorities therein cited.

The premises considered, it is my opinion that an expenditure of county funds for the purpose contemplated by the resolution of the Board of Revenue of Walker County would be wholly without authority of law, regardless of how desirable it might be to make an expenditure of such funds for such purpose.

I premit a discussion of the question of whether or not the Short quadruplets or other members of that immediate family might be eligible for public assistance, just as other individuals and on the same basis as other individuals, through the county and State welfare departments, as that

question is not here presented, except to say that even if they were eligible for public assistance through such departments, these departments would not be authorized to expend their funds for the erection of a private home for them.

Likewise, I here pretermit a discussion of whether or not the Short quadruplets or the other members of that immediate family are residents of Walker County or Winston County, as in my opinion, as indicated above, county funds could not be expended legally for the purpose contemplated by the resolution in any event.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 19, 1940.

Hon. I. C. Heck,
State Comptroller,
Capitol.

State Board of Adjustment—Department of Military and Naval Affairs—

1. Member of Alabama National Guard, while in attendance at or upon regular Field Training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State of Alabama, not engaged in the active military service of the State of Alabama, within the sense that that term is used in Sections 39 and 118 of the Military Code of 1936, Act No. 143, H. 63, approved April 22, 1936 (General Acts, 1936, p. 105).

2. State Board of Adjustment has jurisdiction to hear and consider claims timely filed with it, for compensation for death of members of Alabama National Guard while in attendance at or upon regular Field Training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State of Alabama, while above cited statutory provisions were applicable.

3. State Comptroller authorized to draw warrants in payment of awards in such cases within the limits of Section 9 of Act No. 546, H. 871, approved September 14, 1935 (General Acts, 1935, p. 1164).

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 16, 1940, in which you request my opinion as follows:

"I have been presented with a certified copy of three decrees of the State Board of Adjustment, copies attached hereto.

"The award in each instance is made in favor of the claimants as administratrices of the estate of their deceased husbands as compensation to them for the death of their respective husbands, who were killed in an airplane crash while flying in an Alabama National Guard airplane during Field Training of the Alabama National Guard near Keystone Heights, Florida, except that in one case a supplemental award is also made in favor of the dependent mother.

"You will note that the Board of Adjustment finds in the decrees that the deceased guardsmen were not in the active military duty of the State at the time of their death, as he same is defined in Sections 39 and 118 of the Military Act of 1936, Acts Extra Session, 1936, pages 116 and 142-43, approved April 22, 1936, and as construed by the Circuit Court of Montgomery County, Alabama, in the case of **Chas. W. Lee, As Comptroller of the State of Alabama v. State Board of Adjustment et al**, dated **November 26, 1937, No. 10099**. There was no appeal taken from this decree.

"You will further note that the accident occurred before Act No. 509 of the regular session of the Legislature of 1939, amending the Military Code of Alabama, was approved, said approval having taken place on September 22, 1939.

"I respectfully request your answer to the following questions:

"1. Is a member of the Millitary Establishment of the State of Alabama, while in attendance at or upon regular field training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State of Alabama, engaged in the active military service of the State of Alabama, within the sense that that term was used in Sections 39 and 118 of the Military Act of 1936, Acts Extra Session, 1936, pages 116 and 142-43, approved April 22, 1936?

"2. Did the State Board of Adjustment have jurisdiction to make the three above described awards?

"3 Am I authorized under the law to draw warrants in payment of the said awards above described?"

The certified copies of the three decrees of the State Board of Adjustment attached to your request have been examined, and reveal the following: The award made in each decree is for compensation for the death of a member of the Alabama National Guard, who met his death on July 26, 1939, in an airplane crash while flying in an Alabama National Guard airplane during Field Training of the Alabama National Guard near Keystone Heights, Florida, in the execution of a cooperative air mission for the 62nd Infantry Brigade, pursuant to the provisions of paragraph 16, Special Orders No. 134, Office of the Adjutant General of Alabama dated July 14, 1939, and that the award in each decree is within the limits prescribed by Section 9 of Act No. 546, H. 871, approved September 14, 1935, (General Acts, 1935, p. 1164) which reads, in pertinent part, as follows:

"Section 9. The Board shall not fix a greater amount to be paid on any claim for death or personal injuries that the limits fixed in the Alabama Workmen's Compensation Act for injuries, loss of time, medical attention or death; * * *."

The question of whether or not the State Board of Adjustment has jurisdiction to hear and consider a claim for compensation for injuries or death of a member of the Alabama National Guard, while in attendance at or upon regular Field Training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State of Alabama, has heretofore been considered by the State Board of Adjustment. The files of said Board disclose that the majority of the Board disagreed with the view of the then Attorney General that members of the Alabama National Guard, while in attendance at or upon regular Field Training of the troops of the Alabama National Guard, pursuant to order of the proper military authorities of the State of Alabama, were engaged in the active military service of the State of Alabama, within the sense that term is used in Sections 39 and 118 of Act No. 143, H. 63, approved April 22, 1936 (General Acts, 1936, p. 105) and their predecessors in the statutes of this State; that said act and its predecessors provided a method of compensation for injuries or death of members of the Alabama National Guard engaged in the active military service of the State of Alabama; and that, consequently, the State Board of Adjustment had no jurisdiction to hear and consider a claim for compensation for injuries or death of a member of the Alabama National Guard while in Attendance at or upon regular Field Training of the troops of the National Guard, pursuant to orders of the proper military authorities of the State of Alabama, but the minority member of the Board, the State Comptroller, concurred in this view of the then Attorney General, and declined to pay awards in such cases pursuant to the orders or decrees of the majority members of the Board.

The correctness of the view of the majority members of the State Board of Adjustment was called into question in a petition for declaratory judgment filed in the Circuit Court of Montgomery County, in Equity, No. 10099, styled **Chas. W. Lee, as Comptroller of the State of Alabama, petitioner v. State Board of Adjustment of Alabama et al.** I quote in extenso from the final decree of Chancellor Walter B. Jones in said case:

"This cause, now coming on to be heard before the Court, is submitted for final decree upon the bill, the answer of the respondents, the stipulation of counsel, and the pleadings and proof, all as noted by the Register; and upon consideration thereof, the Court is of opinion that the Military Board of Inquiry had no jurisdiction to make any awards in the claims described in the bill in this cause, because the said members of the Military Department who filed said claims were not on active military duty at the time of their injuries or death; and the Court is of opinion that the State Board of Adjustment had jurisdiction to consider, settle, or adjust said claims. It is, therefore,

"ORDERED, ADJUDGED, DECREED AND DECLARED BY THE COURT AS FOLLOWS:

"1. That a member of the military establishment of the State of Alabama, while in attendance at or upon regular field training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State of Alabama, is not engaged in the

active military service of the State of Alabama, within the sense that that term is used in Sections 1584, 1589 and 1590, Code of Alabama, 1923, and Sections 1600 (57) and 1600 (67) of Michie's Code of 1928, and Sections 39 and 108 of the Military Code of 1931, Acts of 1931, pages 698 and 728, approved July 31, 1931, and within the sense that that term is used in Sections 39 and 118 of the Military Act of 1936, Acts, Extra Session, 1936, pages 116 and 142-143, approved April 22, 1936.

"2. That a member of the military establishment of the State of Alabama, while engaged in armory drill or military aerial maneuvers, pursuant to orders of the proper military authorities of the State of Alabama, is not engaged in the active military service of the State of Alabama, within the sense that that term was used and is used in the statutes next hereinabove cited.

"3. That the State Board of Adjustment of the State of Alabama has jurisdiction to hear and determine claims arising on account of death, injury or disability suffered or incurred by members of the military establishment of the State of Alabama while in attendance at or upon field training, armory drill, or aerial or other military maneuvers, pursuant to orders of the proper military authorities of the State of Alabama.

"4. That the petitioner, Charles W. Lee, as Comptroller of the State of Alabama, has the legal power and authority to draw warrants in favor of the claimants named in said petition and as ordered by the action of the majority members of the State Board of Adjustment."

No appeal was taken from the decree of the Chancellor in said case.

At that time the applicable provisions of the Military Code were Sections 39 and 118 of Act No. 143, *supra*, which read, respectively, as follows:

"Section 39. DEFINITION OF 'IN THE ACTIVE MILITARY OR NAVAL SERVICE OF THE STATE': The Militia ordered into the service of the State for the enforcement of the law, the preservation of the peace, or for the security of the rights and lives of citizens or protection of property in aid and relief of our citizens in disaster, or any similar duty, or any other service that the Governor may for specific reasons so designate, shall be deemed to be in the Active Military or naval service of the State. Officers warrant officers and enlisted men employed under orders of the Governor in recruiting, making, tours of instruction, inspection of troops, armories, storehouses, camp sites, rifle ranges and military property, sitting on General, Special and Summary Courts—Martial and Deck Courts, Boards of Examination, Courts of Inquiry, or Boards of Officers, making and assisting in physical examinations shall be deemed to be in the active military or naval service of the State when it is so specified in orders. Orders shall specify in every case if pay is to be allowed and what expenses incident to travel are authorized. In the discretion of the Governor, ordered armory drills and periods of annual field training or annual cruises ordered and authorized by competent authority may be considered as 'In the Active Military or Naval Service of the State.'"

"Section 118. **COMPENSATION FOR INJURY OR DEATH AND REHABILITATION IN CASE OF PERMANENT DISABILITY:** Every member of the Militia who shall be wounded or disabled, as a direct result of active military or naval service of the State, when called out in case of riot, tumult, breach of peace, resistance to process, invasion, or rebellion, or imminent danger thereof, and whenever called in aid of the civil authorities, or in the aid of our citizens in relief in disaster, or any other service that the Governor may specifically designate as in the active military and naval service of the State, shall be hospitalized and provided for at the expense of the State, and shall be continued in the active military or naval service of the State until maximum possible physical improvement has been reached, not to exceed a period of one year in any case. **DEATH IN ACTIVE MILITARY SERVICE OF THE STATE:** In the case of injury received in line of duty in the active military and naval service of the State, as specified in the above paragraph of this Section, resulting in death, the dependent members of the family of the deceased, if there be such, shall receive the same compensation as is provided by the Workman's Compensation Laws of this State; the earnings of the deceased in his civil vocation being the basis of his compensation, but in no case shall the basis for compensation be less than the pay that the deceased was earning in the active military or naval service of the State. The compensation under this Section shall be paid out of the General Treasury from monies not otherwise appropriated, when not paid by a bonding company. **PERMANENT DISABILITY IN THE ACTIVE MILITARY SERVICE OF THE STATE:** In case of a soldier or sailor being wounded or disabled in the active military or naval service of the State, as a direct result of such service, the disability being of a permanent nature, in order that the soldier or sailor may be able to receive the benefits of the State Industrial Rehabilitation Law, the State shall bear the expense of transportation, subsistence, and shelter of the soldier or sailor during the period of training. The total sum allowed for subsistence and shelter not to exceed fifty dollars (\$50.00) per month, and the actual cost of transportation from his home to and from the place of training. The compensation paid under this Section shall be paid out of the General Treasury from monies not otherwise appropriated, and all claims not made within a period of one year from date of alleged injury, or time of contracting the alleged disability such time to be deemed the end of the period of active duty of such claimant, shall be barred."

However, since that time, and since the date of the death of the members of the Alabama National Guard which gave rise to the instant claims in which the State Board of Adjustment has entered decrees making awards and on, to wit, September 22, 1939, Section 118, supra, was amended by Section 26 of Act No. 509, H. 773, (General Acts, 1939, p. 774) to read in pertinent part as follows:

"Section 118. **COMPENSATION FOR INJURY DISABILITY, AND DEATH:** (a) **Injury and Temporary Disability:** Every member of the Militia who shall be wounded, injured, or temporarily disabled, whether by reason or injury, sickness, or disease, as a direct result of active military service for the State, as defined in paragraph (d) of this section, shall be provided for and furnished necessary medical attention, hospitalization, medicines, and dressings at the expense of the State, and in addition thereto he shall be carried in the active military service of the State until maximum possible physical improvement has been reached, but not to exceed eighteen months; provided that after the first

sixty days the pay of such person shall be computed on the basis of his earnings in civilian life and in the manner prescribed by the Workman's Compensation Laws of Alabama in force at the time such injury or disability occurs, if his pay so computed would be greater than his pay prescribed under this Act for service military or naval service for the State. (b) **Permanent Disability:** Any member of the Militia who shall be permanently disabled, either totally or partially, whether by wound, injury, sickness or disease, as a direct result of active military service for the State, as defined in paragraph (d) of this Section, after having been provided for under provisions of paragraph (a) of this Section until he has reached the maximum possible physical improvement, shall in addition thereto be paid by the State compensation for such disability, the same to be computed in the same manner and on the same basis as shall be provided by the Workmen's Compensation Laws of Alabama in force at the time such disability is caused, except that the maximum weekly benefits payable shall be twenty dollars; provided that the earnings of the disabled person in his civil vocation shall be the basis for computing his compensation, but in no case shall the basis for computing such compensation be less than his rate of military or naval pay under this Act. Dismemberment of any portion of the anatomy shall be considered as at least permanent partial disability and shall be compensated for by the number of weeks benefits provided for similar cases of dismemberment under such Workmen's Compensation Laws. (c) **Death:** In cases of death resulting directly from active military service for the State, as defined in paragraph (d) of this Section, the heirs of the deceased, as defined in said paragraph (d), shall receive the same compensation as shall be provided in the Workman's Compensation Laws of Alabama in force at the time of his death, except that the maximum weekly benefits payable shall be twenty dollars. The earnings of the deceased in his civil vocation shall be the basis for computing such compensation, but in no case shall the basis for computing such compensation be less than his rate of military or naval pay under this Act. Burial expenses not to exceed three hundred dollars are authorized to be paid by the State. (d) **Definitions:** As used in this section, the term 'active military service for the State' shall include service when called out in cases of riot, breach of peace, resistance to process, invasion, rebellion, insurrection, or imminent danger thereof, in aid of the civil authorities, and in cases of disaster, and shall also include periods of field training or similar training or annual cruises ordered by competent authority, performance of official duties by military personnel of the State Military Department, or any other service which the Governor is authorized by Section 39 of this Act to designate or construe as 'In the Active Military or Naval Service for the State' when so designated in orders calling for such service. The definitions of 'permanent total disability' and 'permanent partial disability' set out in the applicable Workman's Compensation Laws shall govern in cases arising under this Section, except as herein otherwise specified. The terms 'heirs of the deceased' or 'Dependent' as used in this Section shall mean dependents of the deceased as defined in the applicable Workman's Compensation Laws, if there be any such dependents; if there be no such dependents, then the term 'heirs of the deceased' shall be as defined by the laws of descent and distribution, and in such cases the compensation payable shall be as for a dependent widow for three hundred weeks, and such compensation shall not be subject to the payment of the debts or liabilities of the deceased. * * * (Emphasis supplied)

It can be seen from the above quoted section, as amended and especially the emphasized portion thereof, that the Legislature has specifically defined periods of Field Training or similar training or annual cruises ordered by competent authorities to be included in the term "Active Military Service for the State" within the sense that term is used in the compensatory provisions of said Military Code, as amended. Apparently, it was a recognition by the Legislature of the correctness of the position of the learned Chancellor in the above styled case that such service was not included in the term "Active Military Service for the State" as that term was used in the then applicable statutes that occasioned this change in our statutory laws on this subject.

Consequently, in view of the decision in the above styled case in the Circuit Court of Montgomery County, in Equity, and the apparent recognition by the Legislature of the correctness of this decision, as evidenced by the amendatory legislation, *supra*, it is my opinion that your inquiries should be answered specifically as follows:

1. A member of the Alabama National Guard, while in attendance at or upon regular Field Training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State, was not engaged in the active military service of the State of Alabama, within the sense that that term was used in Sections 39 and 118 of Act No. 143, *supra*.

2. The State Board of Adjustment had jurisdiction to hear and consider claims for compensation for the death of members of the Alabama National Guard, while in attendance at or upon regular Field Training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State of Alabama, when Sections 39 and 118 of Act No. 143, *supra*, were applicable.

3. You, as Comptroller, are authorized under the law to draw warrants, pursuant to the decrees of the State Board of Adjustment attached to your request, in payment of compensation for the death of members of the Alabama National Guard, while in attendance at or upon regular Field Training of the troops of the Alabama National Guard, pursuant to orders of the proper military authorities of the State of Alabama, at such time, which awards, as pointed out above, are within the limits prescribed by Section 9 of Act No. 546, *supra*.

I am returning herewith to you the certified copies of the decrees which you enclosed with your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 19, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Motor vehicles—

1. Effect of Act No. 212, H. 104, approved August 8, 1939 (General Acts, 1939, p. 363) upon Schedule 158.13 of Section 348, Chapter 6 of Article XIII of the 1935 Revenue Act.

2. One-half year license for motor vehicle may not be sold until May 15.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 23, 1939, in which you request my opinion as follows:

"Please advise me what effect the new Motor Vehicle Law has on the following:

"1. Where motor vehicle is operated up to November 15 but not operated after that date until tag is purchased can we sell same without penalty?

"2. Can a tag be sold on monthly declining basis where car was owned prior to November 15, but not operated between November 15 and the date of application for tag?

"3. On what date can we sell $\frac{1}{2}$ year license?

"I will greatly appreciate your opinion on the above questions as soon as possible."

In answer to your first two inquiries, I quote as follows from an opinion of this office rendered to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 8, 1939, construing Schedule 158.17 of Section 348, Chapter 6 of Article XIII of the 1935 Revenue Act, as amended by Act No. 212, H. 104, approved August 8, 1939 (General Acts, 1939, p. 363):

"The act, supra, also has the effect of extending the life of motor vehicle licenses purchased for the license year 1938-1939, which under the schedule, prior to amendment, would have expired on September 30, 1939, through November 14, 1939, the day before the next motor vehicle license is due under the provisions of said schedule, as amended, supra. Consequently, a motor vehicle may be operated on the highways of this State under a 1938-1939 license through November 14, 1939, without any obligation being incurred thereby for the purchase of a new license for the license year 1940-1941.

"If a person operates a motor vehicle on the highways of this State under a 1938-1939 license through November 14, 1939, but does not so operate it after that date, and after November 15, 1939, sells the same to another person, the purchaser may secure a license for said motor vehicle for the fiscal year 1939-1940 on a monthly declining basis.

See Act No. 67, H. 21, approved February 9, 1937 (General Acts, 1936-37, p. 86), and opinions to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of February 19, 1938 (Quarterly Report of Attorney General, Vol. X, p. 98) and to Hon. J. S. Benson, Judge of Probate, Jackson County, Scottsboro, Alabama, under date of March 29, 1939, (Quarterly Report of Attorney General, Vol. XIV, p. 268)

"Act No. 67, supra, provided in pertinent part: 'Provided, however, that for new and used automobiles acquired subsequent to November 15th in any tax year these licenses shall be purchased on a monthly declining basis of one-twelfth (1/12) or for each month of the tax year and that the purchaser shall only buy a license for the then remaining months of the tax year.' Now that the license year is from November 15-November 14 instead of from October 1-September 30, as formerly, the months would begin on the 15th instead of the first, and a person would not be entitled to a reduction under the quoted excerpt from Act No. 67, supra, until December 15."

From the first paragraph of the quoted excerpt from the opinion to Judge Price, supra, you can see that where a motor vehicle is operated through November 14, or up to November 15, but is not operated on or after November 15 until a license is purchased for the same, the license may be sold without a penalty, since, in such circumstances, no obligation has been incurred for the purchase of a new license.

From a reading of the last two paragraphs of the quoted excerpt from the opinion to Judge Price, supra, you can see that before a license may be purchased for either a new or used motor vehicle on a monthly declining basis, the motor vehicle must have been acquired by the purchaser subsequent to November 15, and if it was owned by the person making application for a license prior to that date a license on a monthly declining basis may not be issued to him.

Your last inquiry, as to the date on which a half year license on a motor vehicle may now be sold, presents a question, the answer to which is not without considerable difficulty.

Schedule 158.13 of Section 348, Chapter 6 of Article XIII of the 1935 Revenue Act provides in pertinent part as follows:

"Schedule 158.13 (a) One-half of the license herein provided for shall be paid plus One Dollar (\$1.00) where the motor vehicle is acquired or brought into the State on or after April 1st of any year, or is not used or operated between the period from October first through March thirty-first following."

The obvious purpose of the pertinent provisions of Schedule 158.13, supra, was to allow a person who had acquired or brought his motor vehicle into the State after the first six months of the license year had expired, or who had not used the same during the first six months of the license year, to then purchase a license for his motor vehicle for the remaining portion of the license year for one-half the amount of the annual license plus \$1.00. The language of the quoted excerpt from Schedule 158.13, supra, effectually accomplished this purpose at the time of its enactment, since, under

Schedule 158.17, *supra*, as it then existed, the license year on motor vehicle licenses was from October 1-September 30, and October 1 was the first day of the license year, March 31 following was the last day of the first six months of the license year, and April 1 was the first day after the expiration of the first six months of the license year.

However, Schedule 158.17, *supra*, was amended by Act No. 212, *supra*. As amended, Schedule 158.17 reads as follows:

"Schedule 158.17. All motor vehicles licenses under this Act shall become due on the 15th day of November of each year, and delinquent after that date; but they shall be issued on application at any time within 45 days prior to that date."

It was also held in the opinion to Judge Price, *supra*, that the amending act changed the license year on motor vehicles from October 1-September 30 to November 15-November 14.

This being true, the question then recurs as to whether or not Act No. 212, *supra*, which only purported to amend Schedule 158.17, *supra*, and did not purport to amend Schedule 158.13, *supra*, has the effect of changing the dates in the quoted excerpt from Schedule 158.13, *supra*, to coincide with the new license year on motor vehicle licenses provided for by said act. In my opinion, the same does have this effect and the dates April 1, October 1, and March 31 used in the quoted excerpt from Schedule 158.13, *supra*, should now be read, respectively, as though they were May 15, November 15, and May 14. In other words, the quoted excerpt from Schedule 158.13, *supra*, should now be construed as if it read as follows:

"Schedule 158.13 (a) One-half of the license herein provided for shall be paid plus One Dollar (\$1.00) where the motor vehicle is acquired or brought into the state on or after May 15 of any year, or is not used or operated between the period November 15 through May 14 following."

Such, in my judgment, accomplishes the legislative intent. To hold otherwise, that is, to hold that a half year license for a motor vehicle could still be issued on April 1, would result in a person being able to secure a license for a motor vehicle for seven and one-half months upon the payment of one-half of the amount of the annual license therefor plus \$1.00. This, in my judgment, was not the legislative intent.

In reaching the above conclusion, I am not unmindful of the well-known rule of statutory construction that the repeal or amendment of statutes by implication is not favored. However, in my judgment, the following equally well-known rules of statutory construction amply support the conclusion hereinabove reached:

1. The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute, and a particular rule for construing statutes must be regarded as subservient to the end of determining the legislative intent. See cases collated in 18 Alabama Digest 119, Statutes, Key No. 181 (1).

2. Courts, in determining the Legislature's intention in construing statutes, may look to other provisions of same act, consider its relation to other statutory and constitutional provisions, view its history and purposes sought to be accomplished, and critically examine the results that would flow from giving the statute meaning it might have if none of these things were considered. **Abramson v. Hard**, 229 Ala. 2, 155 So. 590.

3. A statute is to be construed so as to carry out the intent of the Legislature, though such construction may seem contrary to the letter of the statute, and a literal interpretation which would defeat the purposes of the statute will not be adopted if any other reasonable construction can be given to it. See cases cited in 18 Alabama Digest 120, Statutes, Key No. 183.

4. In construing a particular statute, all statutes relating to same subject or having same general purpose should be read in connection with it, as together constituting one law, and statutes on a subject should be construed together so as to produce a harmonious system, if possible. See 18 Alabama Digest 130, Statutes, Key No. 225.

Your attention is respectfully directed to the following opinions of this office in which the quoted excerpt from Schedule 158.13, *supra*, is considered: Opinion to Hon. W. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of February 22, 1937, Quarterly Report of Attorney General, Vol. VI, page 97; opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of April 21, 1937, Quarterly Report of Attorney General, Vol. VII, page 45; opinion to Hon. J. S. Benson, Judge of Probate, Jackson County, Scottsboro, Alabama, under date of March 29, 1939, Quarterly Report of Attorney General, Vol. XIV, page 269; and opinion to Hon. C. B. Gullatt, Jr., Judge of Probate, Russell County, Seale, Alabama, under date of August 14, 1939, Quarterly Report of Attorney General, Vol. XVI, page 148. The holdings of these opinions in regard to the quoted excerpt from Schedule 158.13, *supra*, should be now read in the light of the effect of Act No. 212, *supra*, upon the provisions of the quoted excerpt from Schedule 158.13, *supra*, which is hereinabove pointed out.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 19, 1940.

Hon. J. H. Hamill, Secretary-Treasurer,
Board of Plumbers Examination &
Registration of Alabama,
3115 North 27th Street,
Birmingham, Alabama.

Board of Plumbers Registration & Examination—

Has no authority to extend time fixed by law for renewal of licenses nor to waive statutory penalty for delinquency.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 13, 1940, in which you request my opinion as follows:

"Under Section 8 of the Act creating the Board of Plumbers Examination & Registration of Alabama there is the following provision:

" * * * but no licensed master plumber or journeyman Plumber may have his license renewed later than January 31st, unless he pay the full fee for registration and license of fifteen (\$15.00) dollars for a master plumber or five (\$5.00) dollars for a journeyman plumber, as the case may be * * * "

"There does not appear any provision in the Act whereby notice is to be given to the plumbers for the renewal of their license. No notice was given to any plumber in Jefferson County or over the state prior to the 31st of January calling it to their attention that their dues were due and payable.

"The State Board did not meet for the election of officers until January 8th and the headquarters for the State Board has just been established at 1021 Massey Building, Birmingham, Alabama, under the supervision of the State Secretary-Treasurer, J. H. Hamill.

"In previous years they have paid the license direct to Mr. Hamill at his place of business in North Birmingham, but many of the plumbers have complained that they did not know where to pay their license and are now objecting to paying the penalty.

"The Board is desirous of knowing whether or not it is within their power under the Act to extend the time for the payment of renewal license until the 15th of March and issue notice to all plumbers of such extension in order that they might pay and avoid the penalty. The Board would appreciate very much the opinion of the Attorney General as to whether or not this extension can be granted and the penalty waived by the Board."

In answer to your inquiry, it is my opinion that the Board of Plumbers Registration & Examination has no authority to extend time fixed by law for the renewal of plumbers' licenses, nor has it authority to waive the statutory penalty in question for delinquency.

Section 8 of Act No. 472, H. 409, approved September 13, 1935 (General Acts, 1935, p. 995), provides as follows:

"Section 8. Application for a license either for a master plumber or for a journeyman plumber must be made to the Board upon printed

blanks furnished by the Board, such blanks to contain spaces thereon to be filled in by the applicant showing his name in full, his age, nativity, color, and place of residence or employment and the length of time he has been engaged in the practice of the calling and with whom for which he seeks license and shall have posted thereon in a space set aside therefor a recent photograph of the applicant, and said application shall be signed by the applicant for registration and license of a master plumber shall be accompanied by a fee of fifteen (\$15.00) dollars and each such application for a registration and license as a journeyman plumber shall be accompanied by a fee of five (\$5.00) dollars. If the applicant successfully stands the examination required of him by the Board, the secretary-treasurer shall officially register such successful applicant and a license to practice the business of master plumber or the trade of journeyman plumber, as the case may be, and such license shall entitle the holder thereof to engage in such business or trade until and including the 31st day of the next following December. Such license shall be renewed without application or examination upon the first day of January, unless same be a legal holiday or shall fall upon the first day of the week, commonly called Sunday, and in either event shall then be issued upon the second day of January or the next succeeding week-day January 1st upon the payment by such licensed master plumber of a renewal fee of ten (\$10.00) dollars and upon the payment by such licensed journeyman plumber of a fee of two dollars and fifty cents (\$2.50) but no licensed master plumber or journeyman plumber may have his license renewed later than January 31st, unless he pay the full fee for registration and license of fifteen (\$15.00) dollars for a master plumbers or five dollars for a journeyman plumbers as the case may be provided any applicant for a license herein provided for who is denied such license by the Board may appeal from such decision of the Board to the Circuit Court of the County in which he lives, does business or is employed."

It will be noted from the above that the time fixed for the renewal of plumber's license is definite and certain. There is a specific provision that if the licenses in question are renewed later than January 31 certain penalties attach. I am unable to find any authority of law which authorizes the Board to extend the time or waive the penalty for delinquency.

Under the circumstances set out in your letter, it may seem to the layman that relief should be granted. However, this office has no authority to alter, change or abrogate the clear and unequivocal language of a statute duly enacted by our Legislature. The statute in question is clear and unambiguous and there is no room for construction. *State v. Tuscaloosa Building & Loan Ass.*, 230 Ala., 476, 161 So. 530.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 19, 1940.

Mrs. Edwina Mitchell,
Associate Member,
State Board of Pardons and Paroles,
Montgomery, Alabama.

Pardons and Parole—Insane Prisoners—

1. Board of Pardons and Paroles held to have no authority to parole insane prisoners into insane hospitals of Alabama.

2. Commitment of insane prisoners held governed by provisions of Sections 1456 and 1457 of the Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter of January 24, 1940, in which you request my opinion as follows:

"We are enclosing copy of a letter received from Dr. Partlow dated January 22, which is self-explanatory.

"The Board has no doubt been careless in paroling convicts into the custody of the State Hospitals for the insane, assuming that we had such authority. Please advise us whether or not such commitments must be by order of the Governor.

"We will thank you for a prompt reply because there are several inmates in our penal institutions who need to be transferred to Dr. Partlow's institutions."

In reply, I wish to advise you that in my judgment the commitment of insane convicts to insane hospitals in Alabama is governed by Sections 1456 and 1457 of the Code of 1923. In my judgment, Act No. 275, S. 186, approved August 25, 1939, does not confer authority on the Board of Pardons and Paroles of Alabama to commit insane convicts to the Insane Hospital at Tuscaloosa. It is further my opinion that neither the above named act of 1939, creating the Board of Pardons and Paroles, nor any other provisions of law which I have found may be said to repeal the provisions of Sections 1456 and 1457 of the Code of 1923, which provide as follows:

"1456. Convicts, when insane; how committed.—In case any person, sentenced to or imprisoned in the penitentiary, or sentenced to or confined at hard labor for a county anywhere in the state, becomes insane, the physician in attendance on said convict shall report the fact to the governor, who shall appoint three suitable persons, one of whom is the said physician, who shall examine said convict, and report the result of their examination to the governor; if said convict is declared to be insane and fit to be sent to the hospital for insane persons, the governor shall direct the proper officer to apply to the superintendent at Tuscaloosa for the admission of the insane convict into the hospital, describing the case according to the same interrogatories prescribed for judges of probate, and, when notified by the superintendent that the insane convict can be received, and to which hospital he shall be taken, the said officer shall send him (or her), at the expense of the state, to said hospital, with a copy of the order of the governor. The same compensation shall be allowed to sheriffs or guards for conveying insane convicts to and from the hospital as is allowed for carrying prisoners to the penitentiary.

"1457. Criminals; when and how committed to hospital.—No criminal or person indicted for crime in the state, who has been declared insane, must be sent to an insane hospital until the sheriff or other of-

ficer having legal custody of said patient shall have forwarded to the superintendent a written application and a description of the case, according to the form prescribed for judges of probate, together with a certified copy of the order of the court, or of the judgment under the authority of which the committal is made, and shall have received information in reply that the patient can be received, and to which hospital he (or she) shall be sent."

Premises considered, it is my opinion that the Board of Pardons and Paroles exercises no authority over the commitment of insane prisoners, as inquired about by you, but that the commitment of insane prisoners is controlled by the above quoted provisions of the Code of 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 20, 1940.

Mrs. C. F. Hart,
Tax Assessor, Covington County,
Andalusia, Alabama.

Taxation — Municipal Taxes — Assessment by County Tax Assessor—Commissions.

County Tax Assessor, assessing municipal ad valorem tax under Act No. 57, H. 183, approved February 27, 1939, not entitled to commissions on real estate bid in and purchased by State, or in litigation, or on erroneous assessments of municipal taxes, or in case of insolvencies.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of January 3, 1940, in which you request my opinion as follows:

"Will you please give me your opinion as to compensation for assessing city tax. The section reads that the tax assessor shall collect out of the first money collected one-half of one per centum, and is it your opinion that we receive that much regardless of land bid in by the State and on errors and insolvents."

From the foregoing, I understand you wish to know whether in computing commissions upon municipal taxes assessed under the provisions of Act No. 57, H. 183, approved February 27, 1939, (Pamphlet Acts, 1939, page 67), (1) Municipal taxes assessed on real estate bid in at tax sales by the State shall be included, (2) whether municipal taxes erroneously assessed and (3) whether taxes assessed and reported on the "list of insolvents" shall also be included.

By Act No. 57, H. 183, approved February 27, 1939, (Pamphlet Acts, 1939, page 67), amending Section 201 of the Revenue Act of 1935, it was intended

to consolidate the procedure for assessment, equalization and collection of municipal property taxes with procedure theretofore employed in respect to state and county taxes, so far as practicable, and to impose upon state, and county officers the functions theretofore exercised by municipal officers in respect to such taxes, in all cases where the municipality elected to avail itself of the privileges of said Act.

The amendment re-enacts said Section 201 of the Revenue Act, and adds thereto by reference certain provisions of Act No. 300, H. 864, approved June 26, 1931 (General Acts, 1931, page 337), restricted in application theretofore to cities and towns with a population ranging between 6500 and 15,000, **City of Opp v. Brogden**, 236 Ala. 180, 181 So. 752; Quarterly Report of Attorney General Vol. XV, pages 231, 235.

In other words, the effect of the amendment is to extend to **all** cities and towns electing to avail themselves of the benefits thereof the provisions of law theretofore applicable only to cities and towns of limited population and to secure uniformity of administration as to state, county and municipal tax statutes.

Section 34 of said act of June 26, 1931, which was incorporated by reference in the act of February 27, 1939, is as follows:

"Section 34. All laws now in force or hereafter enacted in regard to the collection of State and County taxes and procedure, with reference thereto, and the enforcement of collection shall apply to and be in force as to such city taxes, except as such laws are changed by or in conflict with the provisions of this act and the county tax collector shall collect or enforce the collection of such city taxes at the same time, in the same manner and way, and as a part of one and the same collection as the collection of State and County taxes and all procedure incident to or in any wise connected with the collection of State and County taxes shall be equally applicable to the collection of said city taxes and all such city taxes shall be collected in the same way and in the same proceedings as State and County taxes."

Your inquiry must be answered, therefore, by consideration of present existing law as to the tax assessor's commissions in respect to state and county taxes, in connection with any particular enactment relating to municipal taxes only.

Section 24 of the Revenue Act of 1935 (Acts, 1935, page 273) expressly forbids payment to the tax assessor of commissions on (a) errors made in assessments, (b) abatements or deductions allowed the taxpayer, (c) taxes on real estate bid in by the State at tax sales, and (d) "on any assessment to which an objection by the taxpayer, regularly entered, may then be pending, until such objection has been disposed of and proper assessment ascertained and determined," (taxes in litigation).

Section 22 of said Act, as amended by Act No. 326, H. 322, approved August 31, 1939, fixing the rate of the assessor's commissions, bases the commission on the amount of "collections, **not including taxes on real estate bid in by the State at tax sales,**" whereas in enactments prior to the 1935 Revenue Act relating thereto, the rate was based on "collections including" such taxes. (Section 3040, Michie's Cumulative Supplement to Alabama Code of 1928).

Section 178 of the Revenue Act of 1935 (Acts, 1935, page 341) requires the tax collector to report to the county governing body a list of "persons from whom taxes * * * cannot be collected," to be termed "list of insolvents," and further provides for release of the tax collector in respect to such taxes.

Inasmuch as under the Act as amended, (Section 22), commissions to the tax assessor are computed solely on collections, manifestly he is entitled to no commissions upon taxes assessed but not collected by reason of insolvency, so far as State and county taxes are concerned.

By reason of Section 34 of the act of 1931, aforesaid, brought into Act No. 57, aforementioned, in reference to municipal taxes, the tax assessor is not entitled to commissions on municipal taxes, assessed but not collected by reason of insolvency of the taxpayer.

For further support of this opinion reference is made to the opinion of the Attorney General rendered August 14, 1939, to Hon. E. W. Dykes, Tax Assessor, Bullock County, (Quarterly Report of Attorney General, Vol. XVI, page 149), and to part 1 of opinion to Hon. J. Collier Merrill, Tax Collector, Covington County, under date of May 27, 1939, reported in Vol. XV, page 231, of the Quarterly Reports of the Attorney General.

It should be noted that whereas by Section 36 of the act of 1931, aforementioned, the assessor's commissions were fixed at one per cent, the act of 1939 provides they shall be fixed by ordinance of the city governing body at not exceeding one-half of one per cent, so that to that extent the former act has been modified in respect to commissions.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 20, 1940.

Hon. Frank N. Julian,
Superintendent of Insurance,
Department of Commerce,
Capitol.

Insurance—Foreign Beneficial Associations lawfully doing business in this State are subject to laws and regulations of this State governing domestic associations as provided under Sections 8472 and 8503 of the Code of Alabama.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of December 4, 1939, in which you request my opinion as follows:

"Re: Exemptions of Fraternal Benefit Societies.

"Section 8503 of the Code of Alabama as amended by an Act of the Legislature of 1931 (Act 55-39, Davis of Pickens) provides for exemptions of certain societies, and particularly 'societies which admit to member-

ship only persons engaged in one or more hazardous occupations in the same or similar lines of business.' You will further note that the closing part of this Section is a provision which reads as follows:

"'But any such domestic order or society which has **more than five hundred members** and provides for death or disability benefits, and any such domestic lodge, order or society, **which issues to any person a certificate providing for payments of benefits, shall not be exempt by the provisions of this section, but shall comply with all the requirements of this article. The Commissioner of Insurance may require from any society such information, etc.** Further, no society which is exempt by the provisions of this Section from the requirements of this article shall give or allow or promise to give or allow to any person any compensation for procuring new members.'

"Section 8472 of the Code provides for the admission of the foreign societies and you will note therein the requirements: 'It shall be issued a license * * * and such license shall, upon compliance with the provisions of this article be renewed annually * * *. **Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this article.**'

"Will you please advise this Department whether or not, in view of the requirements of Section 8503 that all foreign societies shall meet the same conditions as are required of domestic societies insofar as withdrawal of the exemptions are concerned."

Section 8472 of Michie's Annotated Code of 1928, provides as follows:

"8472. Admission of foreign society.—Any foreign society shall be entitled to a license to transact business within this state upon filing with the commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officer, a power of attorney to the commissioner as hereinafter provided; a statement of its business under oath of its president and secretary or corresponding officers, in the form required by the commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the commissioner of insurance of this state; a certificate from the proper official in its home state, province or country that the society is legally organized; a copy of its contract, which must show that benefits are provided by periodical or other payments by persons holding similar contracts, and upon furnishing the commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province, or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding January, and such license shall, **upon compliance with the provisions of this article, be renewed** annually, but in all cases to terminate on the first day of the succeeding January; but that license shall continue in full force and effect until the new license be issued or specifically refused. **Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this article, and have its assets invested as required by the laws of the state, territory, district, country, or province where it is organized.** For each such license or renewal the society shall pay the commissioner of insurance fifty dollars." (Emphasis supplied)

Section 8503 of Michie's 1936 Cumulative Supplement to the Alabama Code provides in pertinent part as follows:

" * * * any such domestic order or society which has more than five hundred members and provides for death or disability benefits, and any such domestic lodge, order or society which issues to any person a certificate providing for payments of benefits, shall not be exempt by the provisions of the section, **but shall comply with all the requirements of this article.** * * * (Emphasis supplied)

These two sections appear under Article 8 of the Code of 1928 and the Cumulative Supplement of 1936.

By far the most important of the statutory provisions affecting the organization and existence of beneficial associations are those relating to the business of insurance and especially life insurance. It is the general policy in nearly all the states to reserve to the state the right to prescribe conditions on which alone the business of insurance may be carried on. These restrictions assume a variety of forms but their object seems to be to keep all such companies under a rigid supervision for the better protection of the public. 7 Corpus Juris 1056.

A foreign beneficial association which has complied with the laws relating to domestic beneficial associations is entitled to all the immunities and **is subject to all the burdens pertaining to the latter.** *McDermitt v. Modern Woodmen of America*, 97 Mo. App. 636, 71 S. W. 833; *Southwell v. Gray*, 72 N. Y. S. 342, 35 Misc. 742.

Insurance business is affected with general or public interest and within the State's police power reasonably to safeguard and protect. *Banker's Fire and Marine Insurance Company, v. Sloss*, 229 Ala. 26, 155 So. 371.

I am therefore of the opinion that any foreign beneficial society who desires admission to this State shall have the qualifications required by Code Section 8472, supra, and it must comply with the provisions pertaining to domestic societies as prescribed by Section 8503, as amended, and it is subject to the same conditions, qualifications and requirements of the Insurance Department as are required of domestic beneficial societies.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 20, 1940.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—License on money lenders—

Excise tax on financial institutions—

Money lenders within the purview of Schedule 93½.1 of the 1935 Revenue Act required to pay license levied by said schedule and also excise tax levied on financial institutions under Sections 346.1-356.6 of the 1935 Revenue Act, as amended.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 22, 1940, in which you request my opinion as follows:

"Some of our business establishments known as Money Lenders have raised the question as to whether or not they should be required to pay a Money Lender's License as levied under Schedule 93½.1 of the Revenue Code of 1935 after they have been forced to pay the Excise Tax on financial institutions as levied in Section 346.1 of the Revenue Code of 1935.

"In other words, what is ordinarily known as Money Lenders have heretofore paid the regular Money Lenders License as levied under the License Schedule referred to above. Recently they have been classed as Financial Institutions coming under the schedule levying an Excise Tax on Financial Institutions. They are of the opinion that if they pay the Excise Tax which is now being charged them that they should not pay the Money Lender's License as formerly paid by them.

"Please give me an opinion at your earliest convenience as to whether or not the Money Lender's License as levied under Schedule 93½.1 of the License Schedule should be collected where it is apparent the person operating the Money Lenders business has paid the Excise Tax charged Financial Institutions as levied in Article 11, Chapter 1, Section 346.1."

In my opinion, a money lender within the purview of Schedule 93½.1 of the 1935 Revenue Act must pay both the license levied by said schedule and the excise tax levied by Sections 346.1-346.6 of the 1935 Revenue Act, as amended by Act No. 369, H. 192, approved September 13, 1939 (General Acts, 1939, p. 496) and by Act No. 396, approved September 13, 1939 (General Acts, 1939, p. 517).

The license levied by Schedule 93½.1, supra, is a privilege license levied upon each person engaged in business in the manner described in said schedule, whereas, the tax levied by sections 346.1-346.6, as amended, supra, is an excise tax on financial institutions computed in the manner therein detailed, which computation, roughly speaking, is based upon the income of the financial institution.

Both Schedule 93½.1, supra, and Sections 346.1-346.6, as amended, supra, have been examined, and I find no provision in either to the effect that a person paying the excise tax levied by Sections 346.1-346.6, as amended, supra, who also engages in business in the manner described in Schedule 93½.1, supra, is relieved thereby from the payment of the license levied by Schedule 93½.1, supra, if he is otherwise subject to the payment of the same, and vice versa.

I am aware of the fact that Section 346.6 of the 1935 Revenue Act contains the following proviso:

"If any other tax, whether on property (other than ad valorem taxes on real estate), income, business or any element thereof, **except license taxes not in excess of those heretofore legally levied and in effect**, be hereafter levied by this State or by any political subdivision of this State on any financial institution as in this article defined, the amount of such other tax due by such institution shall be credited on account of the tax payable pursuant to the provisions of this article. Provided that no other tax levied by this Act shall be credited against the excise tax herein levied." (Emphasis supplied)

However, the effect of this proviso is merely to allow a financial institution to deduct from the amount of the excise tax which it is required to pay under the provisions of Sections 346.1-346.6, as amended, supra, the amount of certain other taxes which it is required to pay, but the amount of license taxes which, as pointed out above, is the kind levied by Schedule 93½.1, supra, which a financial institution is required to pay, may not be so deducted.

This very clearly shows that the liability of a person or concern for the excise tax levied by Sections 346.1-346.6, as amended, supra, and his or its liability for the license levied by Schedule 93½.1, supra, are entirely separate and distinct.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 20, 1940.

Hon. E. T. Carpenter,
Clerk, Circuit Court,
Washington County,
Chatom, Alabama.

Costs and fees—

1. Clerk of the Circuit Court is entitled to fifteen cents per one hundred words for making record to the Supreme Court or Court of Appeals.
2. Department of Corrections and Institutions authorized to pay costs in felony or misdemeanor cases, where convict is turned over to State, up to \$250.00.
3. Residue of costs, not so paid by Department of Corrections and Institutions, may become proper charge against Fine and Forfeiture Fund of county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 26, 1940, in which you request my opinion as follows:

"Please give your opinion on this case. We have a criminal case that was appealed to Supreme Court and the cost in this case was over \$250.00. We made the transcript and sent it with a bill for the transcript to the Supreme Court, but the bill for making transcript was returned.

"Please advise who will pay the cost for making this transcript as we should not be forced to make this transcript without pay."

Section 3739, Code of Alabama, 1923, is the statutory provision dealing with fees to which the clerks of the circuit courts of this state are entitled. Among other fees the following is provided:

"Record for Supreme Court for each one hundred words—15c."

Section 3667, Code of Alabama, 1923, is the statutory provision which authorizes the State Department of Corrections and Institutions to pay certain items of costs out of the funds of that department where a defendant is convicted and sentenced to the penitentiary. This section provides for the payment of "Record for the Supreme Court (per one hundred words), 15c;". Said Section 3667 deals with cases where defendant is convicted of a felony and sentenced to the penitentiary.

Section 3668, Code of Alabama, 1923, however, limits the operation of Section 3667, *supra*, by providing as follows:

"The whole costs paid in any one case shall not exceed two hundred and fifty dollars."

Under the provisions of Section 3702(10), Michie's Code of 1928, the State is authorized to pay costs of conviction in cases where the defendant is convicted of a misdemeanor and is transferred to the penitentiary to perform hard labor in the same manner as such costs are paid under the provisions of Section 3667, *supra*. The limitation of \$250 provided by Section 3668, *supra*, has been held by this office to apply not only in felony cases, but also in misdemeanor cases. Opinion rendered on January 27, 1940, to Hon. Ernest L. McClure, Clerk, Circuit Court, Lauderdale County, Florence, Alabama.

It is my opinion, therefore, that in a case where the total amount of costs exceeds \$250, the Department of Corrections and Institutions is without authority to pay any items of costs in excess of that amount. I feel sure that the failure of the Department of Corrections and Institutions to pay the fifteen cents per one hundred words for the making of the record for the Supreme Court in your case was based on that fact.

Your bill for making the record for the Supreme Court must not have been presented until after the sum of \$250.00 had been paid or other items of cost or it would have been prorated.

★ That part of the costs which was not paid by the Department of Corrections and Institutions may become a proper charge against the Fine and Forfeiture Fund of your county, provided the conditions of Section 4039 of the Code of Alabama, 1923, as amended, are met. I am herewith enclosing a copy of the opinion just above referred to, which opinion points out

in detail the procedure to be followed in order to make the same a proper charge against the Fine and Forfeiture Fund of the county in a misdemeanor case.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1940.

Hon. Clyde C. Pearson, Secretary,
Board for Registration of Architects,
501 Dexter Avenue,
Montgomery, Alabama.

State Board for Registration of Architects—Officers—

One may hold positions as Chief Architect for State Department of Education and Secretary to State Board for Registration of Architects at one and the same time.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 17, 1940, in which you request my opinion as follows:

"May I hold the office of Secretary to the Board for Registration of Architects, in view of the fact that I am Chief School Architect for the State Department of Education. In January, I received the approval of Mr. Browder, Personnel Director, and Superintendent Collins of the Department of Education.

"The Comptroller has advised me to secure the opinion in writing, and I will appreciate it if you will be kind enough to send me several copies for the Board members and also one copy to the State Comptroller.

"The Act is No. 417, approved October 15, 1931, and amended last year."

In answer to your inquiry, it is my opinion that you may be Chief School Architect for the State Department of Education and Secretary to the Board for Registration of Architects at one and the same time.

Section 280 of the Constitution of 1901 inhibits the holding of two offices of profit under the State by the same party at one and the same time. Neither of the positions held by you are, in my judgment, offices of profit within the contemplation of the constitutional inhibition.

One holding a mere position of employment, who enjoys no tenure of office and is removable at the will of the appointing power, does not hold an office of profit under Section 280 of the Constitution of 1901. *State v. Wilkin-son*, 220 Ala. 38, 124 So. 213; *Kemp v. Wilson*, 17 Ala. App. 224, 84 So. 636. See also Quarterly Report of Attorney General, Vol. XVII, p. 302.

The position of Chief School Architect for the State Department of Education is, in my judgment, merely an employment and not an office of profit.—See Sections 75 and 76 of the School Code of 1927.

The position of Secretary of the State Board for Registration of Architects is provided for in Section 5 of Act No. 417, H. 523, approved July 17, 1931 (General Acts, 1939, p. 290, Pamphlet). Said amended section reads as follows:

“Section 5. The Board shall hold a meeting within thirty days after its members are first appointed and qualified and thereafter shall hold at least two regular meetings each year. The Board shall elect annually a chairman, who must be a member of said Board and a Secretary, who may or may not be a member of said Board and the Board may, with the approval of the Governor, employ such other clerks, experts, attorneys, and other assistants as may be necessary in the carrying out of the provisions of this Act. The Board shall have the power, with the approval of the Governor, to fix the compensation of the Secretary and other employees, * * *.”

The Secretary of the Board, under the above quoted section, is, in my judgment, merely an employee of said Board and does not hold an office of profit.

From the above it follows that the holding of the two positions in question by the same party at one and the same time is not within the inhibition of Section 280 of the Constitution, *supra*. I know of no direct statutory inhibition which would prevent the holding of said positions by the same party at one and the same time. You state that you have the approval of the Personnel Director as to holding the two positions in question. Therefore, I will pre-empt a discussion of the Merit System Act (Act No. 58, S. 44, approved March 2, 1939, General Acts, 1939, p. 68, Pamphlet).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 21, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses—Veterans—Residence—

A World War Veteran who is a permanent, bona fide resident of the State of Alabama, who meets the other requirements of law, is entitled to license exemption where he engages in certain business enterprises and his qualifications to vote do not enter into it.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 8, 1940, in which you request my opinion as follows:

"Please give me an opinion on the following as soon as possible.

"Where a World War Veteran is a qualified elector in another County, but has actually resided in this County for four years, can we grant him exemption on fruit stand license in this County?"

Under Act No. 340, H. 833, approved July 2, 1931, (General Acts 1931, page 397) a World War Veteran, in order to be entitled to the exemption for a business license, need not only to be a permanent resident of the State of Alabama, but, in addition thereto, had to be an elector. This provision proved to be a great hardship on many veterans. So, in 1935 the law was changed by Act No. 494, S. 348, approved September 13, 1935, (General Acts, 1935, page 1057). This Act repealed all laws of whatever kind in conflict with the same. You will note that the 1935 Act, *supra*, leaves out the word "elector" and simply provides in Section 1 of said Act as follows:

"Section 1. That every *bona fide permanent resident of the State of Alabama* who served as an officer or enlisted man in the United States Army, Navy or Marine Corps during the World War between April 6, 1917 and November 11, 1918, or in the Spanish-American War between April 21, 1896 and July 4, 1902, or who served as an officer or enlisted man in the Army or Navy of the Southern Confederacy during the Civil War, and who, at the time of his application for license, as hereinafter provided for shall be physically disabled to the extent of twenty-five per cent or more, shall, upon sufficient identification and upon sufficient proof of such disability and upon sufficient proof of being a permanent resident in this State, and upon the production of an honorable discharge from the service of the United States Army, Navy, or Marine Corps during the World War or Spanish-American War, within the respective limits of time hereinabove prescribed, or from the service of the Southern Confederacy during the Civil War, be exempt from business or occupational license taxes to the extent, and subject to the conditions hereinafter specified. Provided that no exemption, deduction or commutation shall be allowed any person from the license or tax on what is commonly known as rolling stores." (*Italics supplied*)

Section 11 of the Act provides as follows:

"Section 11. No license herein provided for shall be issued in any county other than the county wherein the disabled veteran is a *bona fide resident*, * * *"

The proper construction of the above, however, depends on the meaning of the words "*bona fide resident*", as used therein. The meaning of the word "*resident*" has been given many different and various constructions. A "*resident*" is defined in 54 Corpus Juris, 712, as follows:

"A dweller, or one who dwells or resides permanently in a place. or who has a fixed residence, as distinguished from an occasional lodger or visitor; an inhabitant; one dwelling or having his abode in any place; one who dwells, abides, or lies in a place; one who has his residence in a place; one who resides or dwells in a place for some time; also one who has a seat or settlement in a place."

Applying the above to the facts in the instant case, it is my opinion that the veteran in question is a *bona fide resident* of Elmore County within the contemplation of Section 11, *supra*. And if he meets the other require-

ments of the 1935 act, supra, he will be entitled to the exemption therein granted.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 26, 1940.

Hon. H. G. Beaird,
Road and Bridge Commissioner,
Cullman County,
Cullman, Alabama.

Cullman County—Road and Bridge Commissioner of Cullman County held without authority to pay for hospitalization or medical bills of injured employees or indigent persons.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 17, 1940, in which you request my opinion as follows:

"Your letter of January 10, 1940, in connection with request No. 837 received. I would like for you to examine House Bill No. 152 passed Feb. 15, 1939, creating the office of Road and Bridge Commissioner of Cullman County, Alabama, and render me an opinion as to my authority to pay these medical bills under the General Pauper Act for Alabama."

You refer to request No. 837, previously requested by you, which, in substance, asks the following question: May the Road and Bridge Commissioner of Cullman County pay medical and hospital bills for men employed by the county twenty-two days a month on a daily wage of \$2.75 to \$3.00 per day in emergency cases where said men were injured while in performance of their duties as county employees. This request was answered by referring you to Biennial Report of Attorney General, 1934-36, page 185, and Biennial Report of Attorney General, 1930-32, page 635.

In reply, I wish to advise that in my opinion you, as Road and Bridge Commissioner, do not have authority to pay the medical bills named in your request. In my judgment, your authority must be found in the act creating your office.

The statute creating the office of Road and Bridge Commissioner of Cullman County does not grant authority to the Road and Bridge Commissioner of Cullman County to expend money for the hospitalization of sick or wounded employees of the county. (See Act No. 30, H. 152, approved February 15, 1939, General and Local Acts of 1939, page 13 (Local Acts)).

In my judgment, no authority is conferred upon the Road and Bridge Commissioner of Cullman County to pay hospital bills or medical bills of injured employees or indigent persons in the county.

This opinion is limited to the powers and authority of the Road and Bridge Commissioner of Cullman County, and does not consider the right of county governing bodies to furnish medical treatment and hospitalization for indigent persons.—See Biennial Report of Attorney General, 1934-36, page 68, Biennial Report of Attorney General, 1936-38, page 170.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 26, 1940.

Hon. E. D. Scarborough,
County Custodian,
Lowndes County,
Hayneville, Alabama.

Depositories—County Treasurers—

Act No. 60, H. B. 366, approved March 10, 1933 (General Acts, 1933, page 51), is applicable to one appointed as county treasurer in lieu of county depository under Section 322, Code of Alabama, 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 7, 1940, in which you request my opinion as follows:

"Will you please render an opinion as to whether or not the office I hold as Treasurer of Lowndes County comes under the provision of the Manasco Act (page 51 General & Local Acts of Ala. Extra session 1933) and forward a copy of the opinion to me. I am holding office under a local law which authorizes the Board of Revenue to select a Custodian of public Funds.

"I am enclosing a letter from the National Surety Corporation which will explain my reason for asking the ruling. Please return the letter to me."

In a letter of February 22, 1940, which supplements the above you state that you are appointed County Treasurer under the provisions of Section 322 of the Code of Alabama, 1923.

In answer to your inquiry, I am of the opinion that Act No. 60, H. B. 366, approved March 10, 1933 (General Acts, 1933, page 51), is applicable to one appointed as county treasurer in lieu of county depository under Section 322, Code of Alabama, 1923.

Section 2 of Act No. 60, *supra*, provides as follows:

"Section 2. Upon the application of the County Tax Collectors, **County Treasurers**, Probate Judges, Circuit Court Clerks, and/or Registers of the Circuit Court, it shall be the duty of the Court of County Com-

missioners, Boards of Revenue, or other like governing body of the County to appoint a bank or trust company as a depository in which such officers may deposit monies coming into their hands as such officers; which appointment shall be by proper resolutions spread upon the minutes of such court, Board of Revenue or other governing body. Such court shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State." (*Italics supplied*)

The words "county treasurers", as used in the above quoted section, in my judgment, are sufficiently broad to include the person appointed county treasurer in lieu of a depository under Section 322 of the Code of 1923. The purpose of Act No. 60, *supra*, was to provide that public officers in whose hands public moneys were entrusted should be protected against liability for loss of funds by failure of a bank when funds were deposited in said bank, which was designated by the county governing body as a depository. The words "county treasurers" should be given their broadest meaning in order to effectuate the purpose of the act.

For a general treatment concerning the designation of persons to act as county treasurer in lieu of a depository under Section 322 of the Code of 1923, I wish to refer you to the case of *Jenkins v. State ex rel Watson*, 219 Ala. 554, 123 So. 31.

I am herewith returning letter to you from the National Surety Corporation as requested.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 27, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Justices of the Peace—Costs—

1. A justice of the peace may enter a nol. pros. in a criminal case of which he has final jurisdiction.

2. Where a case before a justice of the peace, of which he has jurisdiction, is nol. prossed before the defendant is placed in jeopardy, such justice of the peace cannot collect the costs in such case under Subsection 2 of Section 3850, Code of Alabama, 1928, Michie.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 15, 1940, in which you request my opinion as follows:

"Please advise me in answer to the following questions:

"1. Can a Justice of the Peace enter a nolle prosequi in a criminal case in which he has final jurisdiction?

"2. If the Justice enters a nolle prosequi in such a case, is the defendant 'acquitted' within the meaning of the term in the second sentence of Sub-division 2, Section 3850, of the Code of Alabama, 1923, thereby entitling him to deduct from fines and forfeitures collected, the amount due for his fees and those of the constable, in cases where the defendant does not pay off, or is insolvent?"

My answer to your first question is in the affirmative. Questions of this character are always left to the sound discretion of the courts. *Willingham v. State*, 14 Ala. 539.

My answer to your second question is in the negative. A nol. pros. is not an acquittal unless it happens after the defendant has been placed in jeopardy. *Grogan v. State*, 44 Ala. 9; *Whitaker v. State*, 21 Ala. App. 114, 105 So. 433.

Where a case is nol. prossed before the defendant is put in jeopardy, if the statute of limitations has not run against the crime for which the defendant was arrested, he may be prosecuted again for the same offense before any court of competent jurisdiction, and on trial the defendant cannot plead former jeopardy. Therefore, such a nol. pros. would not entitle the justice of the peace to collect the costs as an acquittal under Subsection 2 of Section 3850, Code of Alabama, 1928, Michie.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 27, 1940.

Hon. M. E. McConnell,
Judge of Probate,
Sumter County,
Livingston, Alabama.

Elections—Voters—Board of Registrars—

1. Board of Registrars has sole authority to purge a duly registered voter from the poll list.

2. Board of Registrars is without authority to purge the name of a registered voter except at the time the Board is in session for purpose of purging the registration list.

3. Judge of Probate is without authority to strike the name of a registered voter from the poll list submitted to him by the Board of Registrars.

4. A duly qualified elector may challenge on election day the right of a person to vote.

5. Election inspectors may challenge on election day the right of a person who proposes to vote.

6. The domicile of an elector is a mixed question of law and fact dependent upon the intention and acts of the elector.

Opinion by Assistant Attorney General McCall.

Dear Sir:

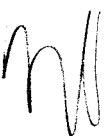
I have your letter of February 13, 1940, in which you request my opinion as follows:

"Please render me an opinion on the following at your earliest possible convenience.

"Mr. John Doe a qualified elector in the State of Mississippi will have been living in Sumter County two years in April of 1940; he registered in this County in November, 1939, has paid two years tax, but voted in the Mississippi election in 1939.

"Does his citizenship start in Alabama from the date he actually moved here from the date he cast his last vote in the State of Mississippi? Should I qualify him as a voter in Sumter County or not?"

In reply to your inquiry I call your attention to an opinion of this office addressed to Hon. William W. Hill, Judge of Probate of Montgomery County, dated March 13, 1935, Biennial Report of Attorney General, 1934-36, p. 110, which holds:

 "Where persons are duly registered as electors by the Board of Registrars, the Probate Judge is without authority to strike the names of such persons from the list of registered voters, even though the applications of such persons on file in the office of the Probate Judge show affirmatively that such persons were not twenty-one years of age at the time of registration and even though such applications of such persons show affirmative irregularities in the matter of residence qualifications."

The authority for purging the registration list of persons disqualified as electors under the provisions of the constitution and laws of the State is vested exclusively in the Board of Registrars of the various counties. (Section 392 of the Code of Alabama, 1923, as amended by Act No. 289, S. 179, approved August 27, 1927.) The Board of Registrars must strictly comply with the statutory provisions of the Code before removing the name of an elector from the poll list. Section 392 of the Code of Alabama, 1923, as amended by the General Acts, 1927, page 276, and as further amended by Act No. 460, H. B. 926, approved September 13, 1935 (General Acts 1935, page 989), provide the time when the Board of Registrars must meet for purging the list of unqualified electors. Section 393 of the Code of 1923, as amended by Act No. 289, S. 179, approved August 27, 1927 (General Acts, 1927, pp. 276, 277), provides the notice of the hearing to be given to all persons whose names are proposed to be stricken from the list.

Section 395 of the Code of Alabama, 1923, as amended by Act No. 289, supra, (General Acts, 1927, page 276) provides for the proceedings at such hearings.

Section 398 of the Code of Alabama, 1923, as amended by Act No. 289, supra, makes it the duty of the Board of Registrars to ascertain the names of persons who should be stricken from the registration list.

Section 399 of the Code of Alabama, 1923, as amended by Act No. 289, supra, directs the Board of Registrars when to strike the names from the registration list and to show the reason for striking the names of said electors from the list.

Section 401 of the Code of Alabama, 1923, among other things makes it the duty of the Board of Registrars to deliver a list of the names of those registered to the Probate Judge. It is to be noted from the reading of the various sections of the Code cited that the duty of purging names from the registration list is imposed upon the Board of Registrars and this duty does not devolve upon the Probate Judge.

This office has ruled that persons who will have at the time of the next general election subsequent to the date of registration the residence qualifications required by Section 178 of the Constitution of Alabama are qualified to register although such person may not possess said residence requirement at the time of registration. Biennial Report of Attorney General, 1936-38, p. 582. This does not mean that such person would be qualified to participate in a primary election to be held before the person had been in the State for two years because Section 183 of the Constitution provides:

"Section 183. No person shall be qualified to vote, or participate in any primary election, party convention, mass meeting, or other method of party action of any political party or faction, who shall not possess the qualification prescribed in this article for an elector, or who shall be disqualified from voting under the provisions of this article."

As I construe this section, a person would be required to be a resident of the State for two years before participating in a primary election. Your inquiry states that John Doe will have been living in Sumter County two years in April, 1940. The primary election is to be held in May, 1940, and if this were the only question he would be eligible to participate in the primary. However, you state that John Doe registered in Alabama in 1939 and voted in an election in the State of Mississippi the same year. This brings up the question of whether or not this party by participating in an election in the State of Mississippi in 1939, would be ineligible to participate in a primary election in Alabama in 1940. In the case of **Pope v. Howle**, 227 Ala. 154, 149 So. 222, Justice Thomas, speaking for the court, held:

"When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that while the determination of the place of legal residence of a citizen presents a question of fact, yet, in determining that fact, **the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector, seeking to cast or undertaking to cast his vote—that determines the right to vote in such precinct.**" (Emphasis supplied)

The rule laid down in this case was subsequently approved in *Wilkerson v. Lee*, 236 Ala. 104, 181 So. 296. The intention of a person to become a qualified elector may be determined by his own acts, and by voting in an election held in Mississippi in 1939 the party clearly indicated that he had not abandoned his "former domicile" in Mississippi, although he had registered in the State of Alabama the same year. This being true, he would not have the qualifications prescribed by the Constitution and laws of Alabama to register.

Section 460 of the Code of Alabama, 1923, provides that a qualified elector may on election day challenge the right of a person who proposes to vote.

Sections 497 through 501 of the Code of Alabama, 1923, provide the method of challenging voters by election inspectors.

Section 522 of the Code of Alabama, 1923, states that the provisions of the chapter pertaining to general elections shall apply to primary elections except where they are inconsistent with the provisions of law governing primary elections.

Act No. 460, H. B. 926, approved September 13, 1935, (General Acts, 1935, p. 589) provides:

"The Board of Registrars shall meet on the first Monday in January, 1936, and each two years thereafter for the purpose of purging the poll list and continue in session one week."

Act No. 289, S. 179, approved August 27, 1927, (General Acts, 1927, p. 276) provides:

"The Board of Registrars shall meet on the second Monday in February, 1928, and each two years thereafter and remain in session one day for the purpose of striking names from the registration list."

The above quoted acts apply to all counties in the State except those counties governed by a local law or special law. I do not find any local law or special law pertaining to Sumter County, therefore, I am of the opinion that Acts 289 and 460, *supra*, provide the only times the Board of Registrars may meet for purging the registration list.

The premises considered, it is my opinion:

1. The Board of Registrars has the sole authority to purge the name of a duly registered voter from the poll list.
2. The Board of Registrars is without authority to purge the name of a registered voter except at the time the Board is in session for the purpose of purging the registration list.
3. The Judge of Probate is without authority to strike the name of a registered voter from the poll list submitted to him by the Board of Registrars.
4. A duly qualified elector may challenge, on election day, the right of a person who proposes to vote.

5. The election inspectors may challenge on election day the right of a person who proposes to vote.

6. The domicile of an elector is a mixed question of law and fact dependent upon the intention and acts of the elector.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

February 28, 1940.

Hon. Frank J. Mizell, Jr.,
Circuit Solicitor,
Andalusia, Alabama.

Statutes—Act No. 368, H. 125, approved September 13, 1939 (General Acts, 1939, p. 487), known as "The Local Option Stock Law for the State of Alabama with the County as the Unit"—

1. The prohibition in said act against horses, mares, mules, jacks, jennies, colts, cows, yearlings, bulls, oxen, sheep, goats, lambs, kids, hogs, shoats and pigs running at large in any county of the State of Alabama not effective until March 1, 1941.

2. In an election held under the provisions of Section 15 of said act, the returns should be canvassed and the results declared in the same manner as the returns of a general election for county officers are canvassed and the results declared.

3. The prohibition in said act against horses, mares, mules, jacks, jennies, colts, cows, yearlings, bulls, oxen, sheep, goats, lambs, kids, hogs, shoats and pigs running at large in any county of the State of Alabama effective on and after March 1, 1941, in every county in Alabama in which no election is held pursuant to the provisions of Section 15 of said act, or in which an election is held pursuant to the provisions of Section 15 of said act, and a majority of the qualified electors participating therein vote in opposition to "cows, calves, yearlings, bulls and oxen" running at large within the county.

4. The prohibition in said act against "cows, calves, yearlings, bulls and oxen" running at large in any county in Alabama, not effective either before or after March 1, 1941, in any precinct or district in a county which did not have a stock law at the time of the passage of said act, if election, pursuant to the provisions of Section 15 of said Act, is held in such county at any time prior to March 1, 1941, at which a majority of the qualified electors participating in such election vote in favor of "cows, calves, yearlings, bulls and oxen" running at large within such county.

5. The prohibition against all of the livestock enumerated in said act, including "cows, calves, yearlings, bulls and oxen", running

at large in any county in Alabama effective on and after March 1, 1941, in all precincts or districts in any county having a stock law at the time of the passage of said act, even though an election is held pursuant to the provisions of Section 15 of said act in the county in which such precinct or district is located prior to March 1, 1941, at which a majority of the qualified electors participating therein vote in favor of "cows, calves, yearlings, bulls and oxen" running at large in such county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your request for official opinion dated February 6, 1940, which is as follows:

"Re: The Local Option Stock Law for the State of Alabama with the County as the Unit.

"The above law provides among other things as follows:

"If a majority of the electors voting in said election vote "Yes", then it shall be unlawful for cows, calves, yearlings, oxen and bulls to run at large in said county until said county shall in a subsequent election held under this Act indicate that it wishes cows, calves, yearlings, oxen and bulls to go at large."

"Question 1: Assuming an election is held under this Act and a majority vote 'Yes,' when do the results of such election take effect? Would it not take effect immediately after the results of the election are certified by the proper authorities?

"Section 15½ reads as follows:

"If any county shall have one or more stock law districts in which cows, calves, yearlings, bulls and oxen are prohibited from running at large, but less than the whole county under such stock law, at the time this Act is passed and approved, then an election held hereunder at which the vote is in favor of cows, calves, yearlings, bulls and oxen running at large shall not repeal any such stock law in such stock law of the passage and approval of this Act."

"At the time this Act was passed and approved Covington County had eighteen such stock law districts, and five open range districts or precincts.

"Question 2. Assuming an election held under this Act, and further assuming a majority of the voters voted 'No,' would the results of this election operate in any way to change the status of said eighteen stock law districts in Covington County? Would not these results merely operate to preserve the statu quo of the five open range precincts?

"Question 3: If a majority voted 'No,' on a stock law election held under this Act, when would the results of such election go into effect?

"In view of the probability of an early election on this question in Covington County I would greatly appreciate an early reply to these

questions, and would also thank you to send me copies of any other opinions that may have been rendered upon this Act, which is Act No. 368 of the Alabama General Laws of 1939."

"The Local Option Stock Law for the State of Alabama with the County as the Unit" is Act No. 368, H. 125, approved September 13, 1939 (General Acts, 1939, p. 487).

While Section 18 of said act provides for it to become effective upon its approval by the Governor, your attention is called to the first sentence of Section 15 thereof, which reads as follows:

"On and after March 1, 1941, it shall be unlawful for horses, mares, mules, jacks, jennies, colts, cows, yearlings, bull, oxen, sheep, goats, lambs, kids, hogs, shoats and pigs to go at large in any county of the State of Alabama."

Thus it can be seen that the prohibition contained in said act against all of the livestock enumerated therein from running at large in any county of the State of Alabama is not effective until on and after March 1, 1941.

The remainder of said Section 15 and Section 15½ thereof read as follows:

"Section 15. * * * An election may be held, however, in the manner hereinafter prescribed in any county in the State of Alabama after the passage of this enactment and its approval by the Governor to determine the sentiment of the voters of each such county as to whether cows, calves, yearlings, oxen and bulls may go at large in each such county. Upon a petition of 25% of the number of qualified electors voting in such county in the last preceding general election being filed with the Probate Judge of any county, the said Probate Judge of such county must call an election to determine the sentiment of the people as to whether or not cows, calves, yearlings, oxen and bulls may go at large in said county. The first said election for the determination of this question may be held in any county at any time after the effective date of this Act. The appointment of officers to hold any such election shall be made in the same manner as appointments to conduct other elections. Provided, if the election is held at the same time of a primary or general election the officers appointed for such primary or general election shall hold the election hereunder. Subject to the above limitations, said election, or any election held under the terms of this enactment, shall be held within not less than 30 days nor more than 45 days from the date of filing said petition, and notice thereof shall be given by the Probate Judge by publication at least three weeks before the date of said election in a newspaper published in such county, or if there be none, by posting such notice at the Court House door of said county, apprising the voters of the county that an election will be held in the several precincts thereof to determine whether such county shall be controlled in its entirety by this enactment or whether in such county cows, calves, yearlings, oxen and bulls may be permitted to go at large. The cost of the publication of notice and the cost of said election shall be paid out of the general funds of the County. On the ballot to be used for such election the question shall be in the following form: 'Do you oppose the running at large within this county of cows, calves, yearlings, bulls and oxen, in accordance with the provisions of the Local Option Stock Law for the State of Alabama with the County as the unit? Yes..... No.....' Only qualified electors shall vote in said election. If a majority of the electors voting

in said election vote 'Yes' then it shall be unlawful for cows, calves, yearlings, oxen and bulls to run at large in said county until said county shall in a subsequent election held under this Act indicate that it wishes cows, calves, yearlings, oxen and bulls to go at large. If a majority of the electors voting in said election vote 'No,' said county shall be an 'Open Range County' under the terms of this Act until it shall, by a subsequent election held under this Act, vote that it shall be unlawful for cows, calves, yearlings, bulls and oxen to go at large in said county. After one such election there can be no other election for such purpose held in such county within two years, and thereafter no additional election may be held within two years from the date of the last prior election. For the purpose of this Act, the term 'Stock Law County' shall mean any county which does not vote 'Open Range', and the term 'Open Range County' shall be understood to mean any County which by a majority of those voting, may direct that it shall be lawful for cows, calves, yearlings, oxen and bulls to go at large in such county. In all 'Open Range Counties' or 'Stock Law Counties' as herein defined, if any horse, mare, mule, jack, jenny, colt, cow, calf, yearling, bull, oxen, sheep, goat, lamb, kid, hog, shoat, or pig be injured or killed while at large on any public highway, no liability for the injury to or death of such animal shall attach to the owner or operator of any vehicle of any kind causing the injury or death, unless it be shown that such injury or death was the result of wilful or wanton conduct of the operator of the vehicle."

"Section 15-½. If any county shall have one or more stock law districts in which cows, calves, yearlings, bulls and oxen are prohibited from running at large, but less than the whole county under such stock law, at the time this Act is passed and approved, then an election held hereunder at which the vote is in favor of cows, calves, yearlings, bulls and oxen running at large shall not repeal any such stock law in such stock law district or districts existing at the time of the passage and approval of this Act."

It is to be noted that no provision is made in the above quoted excerpt from said act, nor is there provision contained elsewhere in said act, for the canvassing of the returns and the declaration of the results of an election held in any county in Alabama, pursuant to the provisions of Section 15, supra. Consequently, it is my opinion that the returns of an election held pursuant to the provisions of Section 15, supra, in any county in Alabama should be canvassed and the results thereof declared in the manner provided for the canvassing of the returns and declaration of the results of a general election for county officers in Alabama by Section 510 of the Code of Alabama, 1923, and Section 511 of the Code of Alabama, 1923, as amended by Act No. 334, H. 33, approved July 2, 1931 (General Acts, 1931, p. 392). Section 15, supra, very clearly indicates that it was the intention of the Legislature for an election held pursuant to the provisions of said section in any county in Alabama to be governed in all respects in accordance with the laws governing general elections, except as otherwise provided in said section. From a reading of said Code sections, supra, it can be seen that the Board of Supervisors of the county, composed of the judge of probate, the clerk of the circuit court, and the sheriff, must meet at the courthouse on Friday next after the election at the hour of twelve meridian and publicly make a correct statement from the returns of the votes from the several precincts of the county, and immediately after so ascertaining the results must make in writing a public declaration thereof, which declaration must be signed by at least two of the supervisors and must be published by filing the original in the office of the judge of probate, which original certificate shall be recorded by the judge of

probate in a book to be provided for the purpose, and by posting a copy thereof at the courthouse door.

It can be seen from the provisions of Section 15, supra, that the prohibition contained therein against all livestock enumerated therein running at large in any county of the State of Alabama, becomes effective on and after March 1, 1941, in every county in the State in which no election is held prior thereto pursuant to the provisions of said section, and in every county in the State in which an election is held pursuant to the provisions of said section at which the majority of the qualified electors participating therein vote in opposition to the running at large within such county of "cows, calves, yearlings, bulls and oxen."

It is to be noted that in the election provided for in Section 15, supra, the qualified electors of a county are only given an opportunity to vote on the subject of whether or not they oppose the running at large within the county of "cows, calves, yearlings, bulls and oxen." They are not given the opportunity of voting on the question of whether or not they oppose the running at large within the county of any other livestock enumerated in said section.

It seems very clear from the provisions of Section 15, supra, and Section 15½, supra, that the only effect of an election held pursuant to the provisions of Section 15, supra, in any county in Alabama at which the majority of the qualified electors participating therein vote in favor of "cows, calves, yearlings, bulls and oxen" running at large in said county is to prevent the prohibition contained in said act against "cows, calves, yearlings, bulls and oxen" running at large in any county in Alabama from becoming effective on and after March 1, 1941, in those precincts or districts in such county which did not have a stock law at the time of the passage of said act. Even in such a county, i. e., in a county in which an election is held pursuant to the provisions of Section 15, supra, at which a majority of the qualified electors participating therein vote in favor of "cows, calves, yearlings, bulls and oxen" running at large in such county, none of the livestock enumerated in said act, including "cows, calves, yearlings, bulls and oxen" may run at large on and after March 1, 1941, in those precincts or districts in such county which had a stock law at the time of the passage of said act.

Applying the above to Covington County, you are advised:

1. The prohibition contained in "The Local Option Stock Law for the State of Alabama with the County as the Unit" against the livestock enumerated therein running at large in any county in the State of Alabama, does not become effective in Covington County as to any of such livestock until March 1, 1941, regardless of whether or not an election is held pursuant to the provisions of Section 15, supra, in Covington County prior to March 1, 1941, and regardless of the outcome of such election if one is held in Covington County prior to that date.

2. If no election is held, pursuant to the provisions of Section 15, supra, in Covington County prior to March 1, 1941, the prohibition contained therein against all of the livestock enumerated in said act running at large in any county in Alabama becomes effective in Covington County on and after March 1, 1941.

3. If an election is held, pursuant to the provisions of Section 15, supra, in Covington County prior to March 1, 1941, at which a majority of the qualified electors participating therein vote in opposition to "cows, calves, yearlings, bulls and oxen" running at large in Covington County, then on and after March 1, 1941, the prohibition contained in said act against all of the livestock enumerated therein running at large in any county in Alabama becomes effective in Covington County.

4. If an election is held, pursuant to the provisions of Section 15, supra, in Covington County prior to March 1, 1941, at which a majority of the qualified electors participating therein vote in favor of "cows, calves, yearlings, bulls and oxen" running at large in Covington County, then on and after March 1, 1941, the prohibition contained in said act against "cows, calves, yearlings, bulls and oxen" running at large in any county in Alabama does not become effective in the five districts or precincts in Covington County which had an open range at the time of the passage and approval of the act, supra, but the prohibition contained in said act against all the other livestock enumerated therein running at large in any county in Alabama does become effective in those five precincts or districts on and after March 1, 1941, and the prohibition contained in said act against all the livestock enumerated therein running at large in any county in the State of Alabama becomes effective on and after March 1, 1941, in the eighteen precincts or districts in Covington County which had a stock law at the time of the passage and approval of the act, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 28, 1940.

Hon. J. R. Alldredge, Chairman,
Board of Finance and Control,
Cullman County,
Cullman, Alabama.

Bonds—Cullman County—Officers—

Under the local act for Cullman County which creates the office of Road and Bridge Commissioner, and which act requires the making of bond by said Commissioner with a surety company, the premium on such bond, when so made, is payable out of the general fund of Cullman County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 11, 1939, in which you request my opinion as follows:

"Please give us your opinion on the following:

"Under authority of Local Law, H. B. 152, passed at 1939 Session of Alabama Legislature, Governor Frank M. Dixon appointed Mr. H. G. Beard, Road and Bridge Commissioner of Cullman County.

"This law transferred part of General Fund revenue to Road and Bridge Fund, viz., The Automobile Tag Tax. This law also under section V abolished all jurisdiction of the Board of Finance and Control of Cullman County over Road and Bridge funds in Cullman County.

"Section II of said Local Act provides for Bond of said Road and Bridge Commissioner. On November 2, 1939, the United States Fidelity and Guaranty Company filed claim with Board of Finance and Control of Cullman County for \$50.00 as premium on Bond for Road and Bridge Commissioner. This Bond was executed on February 15, 1939.

"Will you please advise if Mr. Beard under authority of said Local Act would be required to pay premium on this Bond since he has control over part of the General Funds of Cullman County or would the Board of Finance and Control of Cullman County be required to pay this from the General funds left under their control."

In answering your request, I call your attention to Section 2 of Act No. 30, H. 152, approved February 15, 1939 (Local Acts, 1939, page 13, Pamphlet). This act, among other things, creates and establishes the office of Road and Bridge Commissioner of Cullman County. Section 2, referred to above, is as follows:

"Section Two: Before entering upon his duties as such Road and Bridge Commissioner of Cullman County, Alabama, he shall execute a bond payable to Cullman County in the sum of Ten Thousand Dollars conditioned for the faithful performance of his duties as such Road and Bridge Commissioner of Cullman County, Alabama, with some reputable surety company qualified to do business in the State of Alabama as surety thereon, said bond to be approved by one of the Judges of the Eighth Judicial Circuit."

You will note by the above quoted section that the Road and Bridge Commissioner, which office is created by the local act above referred to, before entering upon the duties of his office is required to execute a bond payable to Cullman County in the sum of \$10,000 for the faithful performance of his duties, etc. He is required to execute such bond with some reputable surety company qualified to do business in Alabama. However, the act itself does not provide how the premiums on such bond shall be paid. So, we are forced to look to the general laws of the State to see if this question can be determined. In this connection, I call your attention to Act No. 191, H. 344, approved April 20, 1933 (General Acts, 1933, page 203). This act deals with the bonds of various county officers and provides in Sections 15 and 22 thereof as follows:

"Section 15. The bonds of all other County officers in Counties where such officers are created by special or local act or acts of the Legislature, or by general acts having application to particular Counties coming within the provisions of such acts, and where the amount of official bonds to be given is provided for in said act or acts shall be of the amount so provided in said act or acts, and where not so specifically

provided shall be in such an amount as in the judgment of the Court of County Commissioners, Board of Revenue or other like governing body of each of such counties is sufficient to secure and safeguard any and all public moneys of whatsoever nature coming into the hands of such officers by virtue of said offices."

"Section 22. That the bonds herein required to be made shall be conditioned as now provided by law, and shall in all respects be subject to and governed by the provisions of law governing, regulating, concerning and pertaining to official bonds except as may be in conflict with provisions of this Act."

You will note that Section 15, supra, provides for the bonds of county officers as are created by special or local acts or by general acts having application to particular counties coming within the provisions of such act. Certainly the office of Road and Bridge Commissioner created by the local act of 1939, Acts of 1933, supra.

Again you will note that Section 19 of the General Act of 1933, supra, says in part:

"Section 19. All bonds provided for in this Act may be made by a surety company or surety companies authorized by their charters to make such bonds provided they are qualified to do business in this State * * *"

As stated above, it is my opinion that the bond of the Road and Bridge Commissioner of Cullman County is provided for by this Act, as set out in Section 15, supra. Section 20 of the General Act of 1933, supra, is as follows:

"Section 20. The premiums on all bonds provided for in this Act, when made by surety companies, shall be paid by the respective counties out of the general funds of said county, except that the premiums on the bonds of Superintendent of Education and of County Treasurer of public school funds shall be paid by the Board of Education of said County out of the three mill school tax and the premiums on all bonds of \$1000.00 or less shall be paid by the officer making said bond."

Following the natural reasoning set out above, I am of the opinion that premiums on the bond of the Road and Bridge Commissioner of Cullman County must be paid by the county out of the general fund.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 28, 1940.

Hon. C. R. Dudley, Chairman,
Board of Equalization,
Russell County,
Seale, Alabama.

County Equalization Board—

Member of the County Equalization Board not disqualified from holding said office by reason of being on the County Democratic Executive Committee.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated February 24, 1940, which follows:

"As chairman of the Equalization Board of Russell County, Alabama, I am requesting that you advise me on the following:

"1. We have a member of this Board who is on the County Democratic Executive Committee, will that disqualify him under the Act creating the Equalization Board?

"2. In case such member should set in the meetings and vote to raise an assessment would that on appeal be sufficient grounds to nullify any final assessments made by the Board?

"We would appreciate your advice at your earliest convenience as our Board meets the 1st Monday in March."

In my opinion, your first question should be answered in the negative.

Section VI of Act No. 143, S. 14, approved March 15, 1939, (General Acts, 1939, p. 178) provides as follows:

"VI. No member of any County Board of Equalization shall hold employment or office of profit with the United States, the State of Alabama, any County or other political subdivision of said State, or with any Board, department or other agency of the United States, of the State of Alabama, of any County or other political subdivision of said State or with any County School Board or with any municipality, while holding office as a member of said Board."

It is my opinion that a member of the County Democratic Executive Committee does not hold an office of profit or employment under the above section, but holds an office in the Democratic party. He holds merely a party office without remuneration. See Act No. 56, H. 73, approved February 25, 1931, (General Acts, 1931, p. 73).

I refer you to the following opinions of this office relative to "offices of profit" within Section 280 of the 1901 Constitution of Alabama: Opinion to P. B. Hamilton, Member, Personnel Board, Mobile County, Mobile, Alabama, under date of November 23, 1939, Quarterly Report of Attorney General, Vol. XVII, page 302; Opinion to Mrs. Marie B. Owen, Director, Department of Archives & History, Capitol, under date of October 25, 1939, Quarterly Report of Attorney General, Vol. XVII, page 121.

From the above, it follows that your second inquiry also should be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 29, 1940.

Hon. C. E. Sauls, Director,
Alabama State Docks and Terminals,
Mobile, Alabama.

State Board of Adjustment—Department of State Docks and Terminals—

1. Claims awarded by same are payable from the fund designated by the Board, in the same manner as other charges against the fund are payable.

2. Copy of decree to be paid out of the fund of the Department of State Docks and Terminals should be sent to the Director of the Department of State Docks and Terminals.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 1, 1940, in which you request my opinion as follows:

"On January 18th the State Board of Adjustment awarded J. E. Molamphy the sum of \$2,800.00 for damages done by fire to certain property of his at the State Docks and ordered that a copy of the decree be furnished the Comptroller and that the Comptroller draw his warrant payable to Mr. Molamphy and charge the 'award against the funds of the State Docks Commission.'

"As I understand it, there has been no specific appropriation by the State to the State Docks out of which this award can be paid. I desire to pay the amount awarded Mr. Molamphy, provided I will incur no risk in so doing.

"Will you kindly advise me whether I am authorized to draw this Department's check to the State Comptroller to reimburse him for the money he is ordered by the Board to pay to Mr. Molamphy, and oblige."

Permit us to preface our comments by setting out in extenso the sections of the act creating the State Board of Adjustment which are pertinent to your inquiry. Act No. 546, H. 871, approved September 14, 1935 (General Acts, 1935, p. 1164) reads in pertinent part as follows:

"Section 3. The State Board of Adjustment in its findings of facts and its findings and decrees as to the amount of payment may also find the agency or agencies of the State of Alabama which inflicted the injury or damage complained of, if the Board finds there is injury or damage done to persons or property, and may adjudge and find that said damage shall be made out of the appropriation made to the agency or department of the State of Alabama, whose employees, servants, agents or instrumentalities inflicting the damages and injuries complained of. **Provided, however, that said Board may order the payment of any claim out of any fund or funds herein appropriated.**" (Emphasis supplied)

"Section 4. The Secretary of the State Board of Adjustment shall make a record of and file in the office of the Secretary of State a history of the case, together with the findings and decrees of the State Board of Adjustment and shall deliver to the Comptroller of the State of Alabama a certified copy of the same, and upon receipt of such a copy of the findings of the State Board of Adjustment with the Comptroller, the Comptroller of the State of Alabama is authorized and directed to draw his warrant in favor of the person or persons, association or corporation, found by said State Board of Adjustment to be entitled to the damages in the amount of the damages so certified and shall **charge the same to the appropriations as directed in said order or finding.**" (Emphasis supplied)

"Section 10. There is hereby appropriated out of the general fund of the State of Alabama and the State Insurance Fund, the Confederate Pensions) the Convict Fund or the highway fund, **or any other fund of the State**, to be determined by such Board, a sufficient amount, not exceeding \$200,000.00 for the next fiscal year and not exceeding \$50,000.00 for any subsequent year, as may be necessary to pay the claims ordered by the Board." (Emphasis supplied)

This act has been twice amended, but in respects not here material.

Therefore, it appears that the act creating the Board gave to it the authority to require the payment of awards made by it out of any fund of the State that it designated. Section 10 makes an appropriation from every fund of the State in such an amount as it necessary to pay awards ordered to be paid from such funds, subject, of course, to the limitations contained in said section. Section 4 requires the Comptroller to issue a warrant in payment of any award made under the direction of the Board and charge same to the appropriation as directed. As we have pointed out, the appropriation is provided by Section 10.

Although Section 4, *supra*, states that a certified copy of the decree of the Board be sent to the Comptroller, it is undoubtedly the legislative intent that the copy of the decree be sent to the officer who has charge of the disbursement of the fund from which the Board has directed the award to be paid. The reason for the Comptroller to have been specifically mentioned in Section 4 is obvious, since he is the disbursing officer for almost all State funds. It is my opinion that in an award to be paid from the Department of State Docks and Terminals, the copy of the decree would more properly be directed to the Director of that department.

Claims of this sort have been paid in the manner hereinabove set out from the fund of the State Docks Commission, the predecessor of the Department of State Docks and Terminals, in several cases. The records of the Board show that among these are W. E. Horne, a claim paid out of the fund of the State Docks Commission on the order of the Board in the amount of \$300,000. Also, George Sossaman, Administrator of the estate of Leo Lambelle, \$750.00; Evie D'Olive, \$500.00; Mary E. Barnes, \$1,500.00.

Our courts have held that the construction given a statute, the language of which is not clear, in the administration thereof over a period of years will lend weight toward that construction. *State v. Tuscaloosa Building & Loan Ass'n.*, 230 Ala. 476, 161 So. 530, 99 A. L. R. 1019; *Waters v. State*, 25 Ala. App. 144, 142 So. 113.

In reaching the above conclusion, the following well known rules of statutory construction also support the same:

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute, and a particular rule for construing statutes must be regarded as subservient to the end of determining the legislative intent. See cases collated in 18 Alabama Digest 119, Statutes, Key No. 181(1).

A statute is to be construed so as to carry out the intent of the Legislature, though such construction may seem contrary to the letter of the statute, and a liberal interpretation which would defeat the purposes of the statute will not be adopted if any other reasonable construction can be given to it. See cases cited in 18 Alabama Digest 120, Statutes, Key No. 183.

Premises considered, it is my opinion that the copy of the decree referred to in your inquiry should be directed to you, as Director of the Department of State Docks and Terminals, instead of to the Comptroller, and that you should pay the same out of the fund of the Department of State Docks and Terminals.

This matter is being called to the attention of the Board, and upon their sending to you a copy of their decree, drawn in accordance with this opinion, it is my opinion that you should issue a warrant against the fund of your department in the amount so stipulated in the award.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 29, 1940.

Hon. J. L. Bowden,
Sheriff, Monroe County,
Monroeville, Alabama.

Elections—An elector must vote in the county or precinct of his residence unless his residence is in two or more counties or precincts, then by proper proceedings under Sections 367 and 368, Code of Alabama, 1928, Michie, he may select the county or precinct which he will claim as his residence.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 16, 1940, in which you request my opinion as follows:

"In this county we elect two County Commissioners every two years, from certain districts.

"Please advise me if it is legal for voters who live on or near the line of these districts, to change their voting places without changing their residence. This is done in order for them to vote for Commissioners in both districts.

"Can a person vote in a district other than the one in which he actually lives?"

Every elector must vote in the county and precinct of his residence. I call your attention to Section 488, Code of Alabama, 1928, Michie, which is as follows:

"488. Elector must vote in county and precinct of residence.—At all elections by the people of this state the elector must vote in the county and precinct of his residence and nowhere else, and must have registered as provided in this chapter; and if any elector attempts to vote in any precinct other than that of his residence, his vote must be rejected, except as provided in Section 361 (290) of this Code."

See *Ex parte Bullen*, 236 Ala. 56, 181 So. 498.

However, there is an exception to the above rule and statute. This exception is as follows: When the place of residence of any person is located partly in two or more counties or precincts, such person may select the county or precinct of his residence by following the provisions of Sections 367 and 368 of the Code of Alabama, 1928, Michie, which sections are as follows:

"367. Residence in two or more counties; right to select.—When the place of residence of any person is located partly in two or more counties or precincts, such person may select the county or precinct of their residence, and to that end may file a statement in writing in the office of the judge of probate of the county selected, setting forth the locality of their residence and the lines passing through the same, together with

the county or precinct selected for residence, which statement, when filed and recorded, shall establish the residence of the person filing it in the county or precinct of their selection.

"368. Liners between counties or precincts.—Any person who may be declared to be a liner between counties or precincts, and shall have fixed his or her citizenship according to law and that may be hereafter provided in such cases, shall be construed a citizen and elector of the county or precinct in which he or she so fixed his or her citizenship, for all the purposes of this chapter."

See Biennial Report of Attorney General 1934-36, page 644.

From the above, it is my opinion that when a voter has selected or established his voting residence according to the above quoted sections, such is permanently established and cannot be changed without a change of residence. Cf. *Denforth v. Neighbors, Morrow & Sinning*, 120 Ala. 430, 24 So. 891.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 29, 1940.

Hon. H. W. McKenzie,
Treasurer, Marion County,
Hamilton, Alabama.

Witnesses—Marion County—

Under Act No. 257, H. 455, approved August 24, 1939 (Local Acts, 1939, p. 154, Pamphlet), all claims or certificates for State witnesses are payable according to registration regardless of whether or not the cases in which the claims or certificates were issued have been disposed of, and this is true whether the claims arose in cases where witnesses certificates or claims were registered prior or subsequent to the passage of the act in question.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 16, 1940, in which you request my opinion as follows:

"Please give me an opinion on the following two propositions, in regard to Local Act Approved August 24, 1939, House Bill No. 455, Act No. 257:

"1. Will I be allowed to pay witness claims where the case has not been disposed of by the court in which pending?

"2. Is this law retroactive to the effect that I will have to pay witness claims, registered before the act became a law, in cases not disposed of by the courts?

"3. Also let me know whether this local law is constitutional."

Section 1 of the act to which you refer in your request, viz.; Act No. 257, H. 455, approved August 24, 1939 (Local Acts, 1939, p. 154), is somewhat ambiguous. This section is as follows:

"Section 1. That the Clerk of the County Court and Circuit Court of Marion County, Alabama, pay all monies collected for State Witness Claims by said clerk over to the County Treasurer of said County in the same manner as other fines and costs which are collected by said clerk."

What is meant by the expression "in the same manner as other fines and costs which are collected by said clerk" is not clear. It is true that under the general law the clerk turns over all fines collected to the county treasurer to be credited to the fine and forfeiture fund, but not so with the costs. The clerk of the circuit court, as such, and as ex officio clerk of the county court, does not turn the costs over to the county treasurer, but pays them out to officers and witnesses entitled to same. However, as I construe the act, it changes the mode of payment of State witness claims or certificates in that all the money collected for said witnesses must be paid into the county treasury to the credit of the fine and forfeiture fund.

Section 3 of the act provides as follows:

"Section 3. That said County Treasurer of Marion County, Alabama, shall register all State witness claims and pay the same according to registration when presented for payment."

Under this section it will be noted that the Treasurer of Marion County shall register all witness claims and pay the same according to registration when presented for payment. In my judgment, this section applies to the payment of all claims registered under the act or heretofore registered by the Treasurer.

The premises considered, it is my opinion that the act under consideration makes all State witness claims payable out of the fine and forfeiture fund of the county according to registration. In my judgment, it matters not whether the witness claims were registered prior to or after the passage of the act. Also, it is my opinion that it applies to witness certificates issued in cases which arose prior to the passage of the act as well as those subsequent thereto.

Your third inquiry is laid in very general terms. This office, taking a cue from the courts, undertakes to pass upon the constitutional validity of a statute only when the request is squarely presented, and then only to the objections urged against it. **Quarterly Report of Attorney General, Vol. II, p. 295.** If you desire my opinion as to whether or not said act violates any particular section or sections of the Constitution, please advise.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

February 29, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Taxation—Income Tax—Government—Reservations—

Persons, not residents of or domiciled in Alabama, residing on land acquired by the United States under Article I, Section 8, Clause 17, of the Federal Constitution and Sections 1505 and 1506 of the Code of 1923, not subject to Alabama State Income Tax.

Persons, residing in Alabama, or spending in the aggregate more than seven months of the income year within the State, not on land acquired by the United States, as aforesaid, whose income is earned and received on such land, from whatever source, are subject to the provisions of said Income Tax Law.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of February 9, 1940, which follows:

"I am in receipt of a letter from Major John M. Davies, The Air Corps Tactical School, Maxwell Field, Alabama, which was written pursuant to a conference with this office in regard to jurisdiction of the State of Alabama over Maxwell Field officers, enlisted men and employees residing on the Government Reservation in enforcement of the Income Tax Law requiring returns and payment of tax of such officers and employees not maintaining a permanent place of abode in Alabama but residing at Maxwell Field. The letter is quoted as follows:

"With reference to our conversation of February 5, at your request the following questions are put in writing for a ruling:

"1. Are persons, not domiciled in Alabama and not maintaining a permanent place of abode within Alabama, but residing at Maxwell Field, considered to be residents of Alabama and so liable to pay income tax to Alabama?

"2. Are persons, not domiciled in Alabama, but residing in Alabama, i.e., not on Maxwell Field, liable to pay income tax to Alabama on income earned and received at Maxwell Field?

"These in view of the exclusive jurisdiction over Maxwell Field ceded to the United States by Alabama with the exception of the right to serve summons and processes thereon. This exclusive jurisdiction seems to have been upheld by Alabama in the matter of liability of persons on Maxwell Field to pay gasoline tax (the case of Algernon Blair), sales tax, personal property tax, and liquor tax.

"Thanking you for your courteous consideration of my requests for information, _____,"

"An opinion is requested in the premises.

"Since income tax returns for the year 1939 are delinquent if not filed on or before March 15, it will be greatly appreciated if you will give the matter attention and let us have the opinion at your very earliest convenience."

I am of the opinion: (1) That persons not domiciled in Alabama and not maintaining a permanent place of abode within Alabama, but residing at Maxwell Field, are not to be considered residents of Alabama and are not, therefore, liable to pay income tax to Alabama; and

(2) That persons, not domiciled in Alabama, but residing in Alabama, i. e., not on Maxwell Field, provided they "spend in the aggregate more than seven months of the income year within the State," are liable to pay income tax to Alabama on income earned and received at Maxwell Field.

The tract of land known as Maxwell Field was purchased by the United States with the consent of the Legislature of the State of Alabama, in 1920, for one of the uses, apparently, contemplated by Article I, Section 8, Clause 17 of the Constitution of the United States, to wit, "for the erection of forts, magazines, dock-yards, and other needful buildings," for federal purposes.

State v. Blair, 191 So. 237 (October 12, 1939).

Legislative consent to the acquisition is evidenced by Sections 898-899 of the Code of 1907 (recodified as Sections 1505 and 1506 of the Code of 1923) reading as follows:

"1505. Cession of certain lands to United States.—The state of Alabama has ceded to the United States of America jurisdiction over all lands which have been or may hereafter be purchased or otherwise acquired by the said United States in the state of Alabama, for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building of any kind whatever, and the legislature of the State of Alabama has consented to all such purchases or acquisitions by said United States of America."

"1506. Duration of jurisdiction.—The jurisdiction ceded shall continue during the term the United States of America shall remain owner of the land so purchased, and shall be exclusive for all purposes except that the service of process issued out of the courts of the State of Alabama, shall not be prevented therein."

In **State v. Blair**, supra, it was held that the so-called State gasoline excise tax imposed upon the storage or withdrawal from storage of gasoline in Alabama, beginning with statutes enacted after the acquisition by the United States in 1920 of Maxwell Field, did not extend to gasoline stored or withdrawn from storage there, by reason of the fact that the State had ceded exclusive jurisdiction and under the federal constitution the United States had the right to exclusive legislation over the area ceded.

So in **Surplus Trading Co. v. Cook**, 281 U. S. 647, 50 S. Ct. 455, 74 L. ed. 1091, it was held that land purchased by the United States for an army station, with the consent of the legislature of the State in which it lies, comes under the exclusive jurisdiction of the United States, and private personal property there situated cannot be taxed by the State.

And in **Standard Oil Co. v. California**, 291 U. S. 242, 54 S. Ct. 381, 78 L. ed. 775, it was held that a State is without power to levy a license tax in respect to the sale and delivery of goods on a military reservation included within the exterior limits of the State but over which the full legislative authority has been ceded to the United States by an Act of the State Legislature.

The result is that we are driven to the conclusion that the State income tax does not fall on non-residents of Alabama residing on territory ceded to the United States by Alabama under the provisions of Sections 1505 and 1506 of the Code of 1923 and similar prior statutes.

A different result prevails as to persons residing in Alabama more than seven months of the income tax year, though not citizens of or domiciled in Alabama, whose income is earned or paid at Maxwell Field or on other territory ceded by the State to the Federal Government. Such persons are expressly within the terms of Section 345.1, subdivision (b) and Section 345.3, subdivision (d) of the Income Tax provisions of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, pages 256, 397), viz., that every natural person who "spends in the aggregate more than seven months of the income year within the State, shall be presumed to be residing within the State for the purposes of determining liability for income taxes."

The income of such persons, though earned and received at Maxwell Field or on other ceded territory acquired by the United States with legislative consent, is none the less taxable under the Alabama Income Tax Law.

State v. Weil, 232 Ala. 578, 168 So. 679;

Act No. 64, H. 54, approved March 2, 1939 (General Acts, 1939, page 94).

The foregoing conclusions are not, in my opinion, in conflict with the recent decision of the U. S. Supreme Court in **James Stewart & Co., Inc., v. Katherine Sadrakula, as Admr.**, etc., decided January 29, 1940, re-affirming the doctrine that state law and statutes affecting and fixing the private rights of occupants of ceded territory, existing at the time of cession, continue to be effective over the ceded territory until abrogated by Congress, if not in conflict with federal law or the purpose for which the land was acquired.

Chicago, R. I. & Pac. Ry. v. McGlinn, 114 U. S. 542, 5 So. Ct. 1005, 29 L. ed. 270;

Vilas v. Manila, 220 U. S. 345, 31 S. Ct. 416, 55 L. ed. 491;

Pound v. Gaulding, 237 Ala. 387, 187 So. 468.

In any event, the principle declared in these cases would be unavailing to subject residents of Maxwell Field, not domiciled in Alabama, to the provisions of the Alabama Income Tax Law, inasmuch as Maxwell Field was acquired prior to enactment of the Alabama Income Tax Law.

Pound v. Gaulding, *supra*;

Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. ed. 447.

Income earned and received at Maxwell Field, it may be added, is taxable as any other income, whether paid by the United States or its agencies, instrumentalities or contractees, providing the person earning and receiving the same is subject to the State Income Tax Law by reason of residence domicile or otherwise.

Act No. 64, *supra*;

State v. Weil, *supra*;

Graves v. New York, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 1, 1940.

Hon. J. R. Alldredge, Chairman,
Board of Finance and Control,
Cullman County,
Cullman, Alabama.

Hospital Board—Cullman County—

The premiums payable on procurement of the necessary insurance to indemnify against loss of property of the hospital operated by the Hospital Board created by Act No. 226, S. 218, approved August 11, 1939 (General and Local Acts of 1939, page 129), as a necessary operating expense of said hospital, are payable out of the operating fund of said hospital.

In the event the Hospital Board fails or refuses to procure such insurance, Cullman County may procure the same, to the extent of the value of the County's interest in said hospital property and pay the premiums thereon out of the County funds.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry in which you request my opinion as follows:

"Cullman County and the City of Cullman under an agreement with the Federal Government through its P. W. A. Agency secured a building site and erected a Hospital for Cullman County. The Deed to this property was executed by grantors to the County of Cullman.

"The 1939 session of the Alabama Legislature passed Senate Bill No. 218 introduced by Mr. St. John on July 29, 1939 creating a Hospital Board of five members and naming the personnel of Hospital Board.

"On October 14, 1939 the above mentioned Board assumed operation of this Hospital under this Bill.

"Please advise on the following two questions.

"(1) Is it the duty of the County Governing Body, to-wit: The Board of Finance & Control, Cullman County, Alabama, to secure insurance on the buildings, equipment, etc., and casualty insurance for protection of patients, and pay the premiums on such policies from the general funds of said County and City?

"(2) Is it the duty of the Cullman Hospital Board to secure insurance on the buildings, equipment, etc., and casualty insurance for the protection of patients, and pay the same from its operating capital?"

I think it proper to transpose your inquiries for the purpose of answering the same.

Answering your question No. 2, it is my opinion that it is the duty of the Hospital Board to operate the hospital in an efficient and businesslike manner; and if the procurement of insurance to indemnify against loss of the property and casualty insurance to protect said Hospital Board and its agents, contractors, and employees from liability for damages, is considered to be usually and necessarily required in the efficient and businesslike operation of such institutions, the duty devolves upon said Hospital Board to procure such insurance. Section 2 of Act No. 226, S. 218, approved August 11, 1939 (General and Local Acts, 1939, Pamphlet, page 129), provides:

"Section 2. That said Hospital Board be and it is hereby authorized and empowered to equip, maintain, supervise and operate the hospital owned by the County of Cullman and the City of Cullman, for the reception of the sick, wounded and infirm and of people in need of hospital treatment, and to make such rules and regulations as are necessary for the proper operation of said hospital."

By Section 7 of said act, provision is made for the County of Cullman and the City of Cullman jointly to contribute public monies, not in excess of \$500 per month, for the operating expenses of said hospital.

By Section 6 thereof, it is provided that the Hospital Board shall have authority to make expenditures for operating expenses, without the consent and approval of the governing bodies of the City or County.

It is my opinion that if it is determined that the procurement of the types of insurance referred to in your request is a necessary part of the efficient, businesslike operation of said institution, the Hospital Board should pay the premiums upon such insurance from any funds available for the payment of the operating expenses of the said institution.

Of course, in the event that the Hospital Board does not procure the insurance to indemnify against loss of property, the County, under the authority of subsection 24 of Section 6755, Code of Alabama, 1923, as amended (Michie's 1936 Cumulative Supplement to the Code of 1928) has full power to procure such insurance up to the value of the County's interest therein, and to pay the premiums thereon out of the public funds of the County. The City has like power to procure such insurance up to the value of its interest therein, and to pay the premiums thereon out of the City funds. In addition, the City probably has authority to procure casualty insurance. Sections 1908 (11) and 2045 of the Code of Alabama, 1923.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 1, 1940.

Hon. D. M. Maxwell, Jr.,
Treasurer, Monroe County,
Monroeville, Alabama.

Officers—Treasurer—Sheriff—

Elections—Section 509, Code of 1923.

Election officer is not entitled to double compensation although he performs service in connection with his functions on two successive days.

Treasurer and his sureties are liable for overpayment of compensation to election returning officer.

Sheriff and his sureties are liable for issuance of certificate to election officer for more compensation than allowed under Section 509 of Code of 1923.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of February 19, 1940, in which you request my opinion as follows:

"As Treasurer of Monroe County, Alabama, I would like to secure from you your opinion on the issuing of Election Officers' certificates by the Sheriff to Returning Officers serving in an election and my liability as Treasurer in making payment on them, in the case as stated below:

"The sheriff issues an election officer's certificate to a person serving as Returning Officer of an election for \$4.00, plus mileage at the rate of 5c per mile for the distance traveled in his duty as Returning Officer. The Returning Officer having returned the ballot box to the Sheriff on the date following the election date and the Sheriff considering him serving two days issued the certificate on the basis of \$2.00 per day for his services plus the mileage. The code of the State of Alabama pertaining to the amount of payment for Election Officers states that they should receive \$2.00. It does not state whether this would be considered as payment for one day or for his services during the election. The reason for the Returning Officer not bringing the ballot box to the Sheriff on the night of the election date is due to the distance of travel from the voting place to the Sheriff's Office.

"With the case as above given, I would appreciate your opinion as to the liability of the Sheriff issuing the certificate and my liability as Treasurer for making payment from the County's funds."

In answer to your inquiry, it is my opinion that the returning officer is not entitled to two days' compensation. I call your attention to Section 509 of the Code of Alabama, 1923, which provides:

"Section 509. Pay of election officers.—The returning officer, the inspectors and clerks, **shall each be entitled to two dollars**, and the re-returning officer, in addition, to five cents a mile in going to the courthouse and returning to the place of holding the election; the several claims to be paid out of the county treasury, on proper proof of the service rendered, to be preferred claims, payable from the money in the treasury not especially otherwise appropriated." (Emphasis supplied)

Your attention is further called to Act No. 56, H. 73, approved February 25, 1931 (General Acts of Alabama, 1931, p. 73. Section 673(7) of Michie's 1936 Supplement to the Alabama Code of 1928), which provides in pertinent part as follows:

"The officers, and other expenses of any and all primary elections, general or special, held under the provisions of this article shall be paid for in the same manner and to the same extent as is or may be provided by law for the payment of the expenses and officers of general elections * * *."

It is well settled that an officer, or the one performing the duties of the officer, shall receive as compensation for his service only such as is provided by statute. He takes the office "cum onere." Biennial Report of Attorney General, 1926-28, p. 144.

Section 303 of the Code of Alabama, 1923, prescribes the various duties of the County Treasurer.

Section 2612 of the Code of Alabama, 1923, defines the legal effect of every official bond and provides, among other things, that the bond is obligatory on the principal and sureties for the use and benefit of every person who is injured by any wrongful act committed under color of office, or the improper or neglectful performance of those duties imposed by law.

A careful reading of Section 509, supra, convinces the writer that **there is a duty on the County Treasurer to determine the validity and legality of the claim presented by the election officer.** Such a claim is to be distinguished from a claim examined and allowed by county governing bodies, the invalidity of which does not appear upon its face, or upon the records of the governing body, or the Treasurer does not have actual knowledge of the invalidity thereof. Cf. Quarterly Report of Attorney General, Vol. VIII, p. 5.

It will be noted that in the case of claims in favor of election officials proper proof of the service rendered must be presented to the County Treasurer. The County Treasurer is charged with a specific duty in regard to these particular claims. He is charged with the knowledge of what compensation is allowed under the law for election officials. I am, therefore, of the opinion that the County Treasurer, and his sureties on his bond, are liable for the overpayment of claims to election officials.

The sheriff of the County, in the issuance of the certificate to the election officials, is performing an official act. If the sheriff issues a certificate for more than the amount allowed by law and the certificate is paid, the sheriff and his sureties on his bond are liable for the overpayment of the claim. Cf. *Pickett v. Richardson*, 223 Ala. 683, 138 So. 274.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 1, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Fees and Costs in County Courts—

1. A fee of fifty cents for making an order of continuance attaches for the services of the judge of the county court, which fee belongs to the county.
2. Clerk of circuit court, who is ex officio clerk of county court, entitled to fee of twenty-five cents for entering such order.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 16, 1940, in which you request my opinion as follows:

“Please refer to Sections 3739 and 3758 of the 1923 Code of Alabama, and advise me in answer to the following question:

"1. Can the Circuit Clerk, who is Ex-Officio Clerk of the County Court, charge a continuance fee of 25c for himself in the County Court, and also charge a continuance fee of 50c for the County in the same case?"

I am of the opinion that your inquiry should be answered in the affirmative.

It is my opinion that under Section 3758, Code of Alabama, 1923, a fee of fifty cents for making an order of continuance attaches for the services of the judge of the county court, which fee belongs to the county. I call your attention to that part of Section 3758, *supra*, which provides for fees in county courts, where it says:

"For each order of continuance, fifty cents."

Under the old law providing for county courts, the judge of the county court acted as his own clerk under Section 6698 of the Code of 1907, but this section was repealed by Act No. 214, H. 104, approved August 22, 1919, (General Acts, 1919, page 200). Part of the said 1919 Act now appears as Section 3803 of the Code of Alabama, 1923, and provides as follows:

"Section 3803. Clerks of circuit courts are ex officio clerks of county courts.—The clerks of the circuit courts of the several counties of the state are made ex officio clerks of the county courts of their respective counties."

I also call your attention to Section 3804, Code of Alabama, 1923, which is as follows:

"Section 3804. Fees of clerks of county courts.—The fees and compensation of said clerks for their duties as clerks of the county court shall be the same as now allowed by law to the clerks of the circuit court in criminal cases, and shall be paid in like manner."

So, under the present system pertaining to county courts, the clerk of the circuit court is, by Section 3803, *supra*, made ex officio clerk of the county court; and, under Section 3804, *supra*, the fees and compensation of the clerk of the circuit court when acting as ex officio clerk of the county court are the same as are allowed by law to the clerks of the circuit courts in criminal cases, and shall be paid in like manner.

Therefore, I am of the opinion that the clerk of the circuit court, when acting as ex officio clerk of the county court, is entitled to a fee of twenty-five cents for entering the order of continuance. I call your attention to that part of Section 3739, Code of Alabama, 1923, which provides for the fees of circuit clerks, where it says:

"Each continuance, twenty-five cents."

See Quarterly Report of Attorney General, Vol. XII, p. 136.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 6, 1940.

Hon. H. O. Summerford, Member,
Houston County Board of Revenue,
Route No. 1,
Gordon, Alabama.

Under the general law of the State, a county is without authority to employ a county marshal or patrolman.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 28, 1940, in which you request my opinion as follows:

"Will you please give me your official opinion in reference to the authority of Courts of County Commissioners or Boards of Revenue?"

"I would like to know if the Board of Revenue of Houston County is authorized to employ a County Marshal or Patrolman and, if so, from what fund should he be paid and what is the salary limit, if any."

Before the commissioners court or other like governing body of a county can pay out money for any purpose whatsoever it must be able to point to some statute expressly or impliedly authorizing such payment. Whatever power such court has is derived from legislation. Such court has no inherent or constitutional power. *State v. Street, et al*, 117 Ala. 203, 23 So. 807.

Therefore, my answer to your request is in the negative as I am unable to find any general law authorizing such employment or expenditure. If you have in mind the provisions of any local law or general law of local application bearing on this question, I shall be glad to express an opinion on its effect upon the question submitted.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 7, 1940.

Hon. Walter P. Gewin,
Member, House of Representatives,
Hale County,
Greensboro, Alabama.

Counties—Court of County Commissioners—Schools—

Court of County Commissioners authorized to appropriate money from the general fund of the county for the benefit of the schools of the county.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of March 6, 1940, in which you request my opinion as follows:

"The public school funds of Hale County, Alabama, from all sources, for the present school year will be exhausted when the public schools in Hale County have run approximately seven months. The County Board of Education of Hale County, and the citizens of Hale County generally, are desirous of operating the public schools of Hale County for approximately eight months, so that the students in the public schools of Hale County may secure the necessary credits for this year's school work. It is estimated that approximately \$9,000.00 will be necessary to run these schools for the desired period of time. To this end, it is believed that approximately \$4,000.00 will be raised by public subscription from the citizens of Hale County; and it is hoped that arrangements legally may be made by the County Board of Education of Hale County to borrow approximately \$3,000.00 to be used for this purpose. This would leave a deficiency of approximately \$2,000.00.

"Your opinion is requested as to the legal power and authority of the Commissioners Court of Hale County to appropriate to the County Board of Education of Hale County, to be used for the purpose of supplying this deficiency, a sum not in excess of \$2,000.00 from any of the funds under its custody and control.

"Since time is of the essence in this matter, your reply to this request at the earliest possible moment, consistent with your other duties, will be greatly appreciated."

Title 52 Sec. 207

Act No. 602, H. 751, approved August 4, 1931 (General Acts, 1931, p. 687) reads in pertinent part as follows:

"Section 1. The Courts of County Commissioners or Boards of Revenue of the several Counties of Alabama are hereby authorized at any meeting of said Court in any Calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the County Treasurer for the support of the Public Schools within said county."

Research has revealed no amendments to, nor any repeal of, this act. Under the authority of the act, *supra*, I am of the opinion that the Court of County Commissioners of Hale County may make an appropriation from the general fund of the county for the purpose set out in your request.

In an opinion to Hon. J. B. VanValkenburgh, under date of April 4, 1936, Quarterly Report of Attorney General, Vol. III, page 20, this specific question was considered, and it was held that "this act (*supra*) specifically

grants authority to a county board of commissioners to make appropriations of the nature mentioned in the resolution (same as here)." In that opinion numerous other opinions are cited which reach the same conclusion as reached herein. See also opinion to Hon. G. H. Howard, under date of November 12, 1937, Quarterly Report of Attorney General, Vol. IX, p. 90.

Your attention is called, however, to the facts that the general fund of the county must be operated within its income (Act No. 379, H. 191, approved September 9, 1935, General Acts, 1935, p. 803, generally known as the County Financial Control Act), and that an appropriation from the general fund of the county for the purpose set out in your request may not be made unless there is a surplus in such fund. **Rhodes v. Marengo County Bank**, 205 Ala. 667, 88 So. 850.

I know of no authority of law for the expenditure of monies in the other funds of the county, such as the road and bridge fund, the gasoline tax fund, the sales tax fund, etc. for school purposes.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 8, 1940.

Hon. M. E. Pritchett,
Tax Assessor,
Marengo County,
Linden, Alabama.

Boards of Equalization—Act No. 143, S. 14, approved March 15, 1939, General Acts, 1939 p. 178.—

1. Boards of Equalization in counties whose total assessment value of all property does not exceed \$10,000,000 authorized to sit at any time during the months of March, April, June and July of each year, and at such other times as the members of the County Boards of Review shall have heretofore been required to serve.

2. Boards of Equalization must perform duties imposed by Section XIV of said Act within the time therein provided.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated March 4, 1940, as follows:

"The Marengo County Board of Equalization met in my office March 4th to begin Review of Marengo County Assessments for the year 1940.

"I called their attention to Section XIV of the law in which it says, That the Board of Equalization shall meet on the 2nd Monday in March, and sit at the Court House until their duties are completed, but not later than the 1st Monday in April.

"This gives the Board only 19-working days which is not enough time to properly review the taxes.

"The Board is a new Board and it will be necessary to inspect a great deal of property in order to determine whether or not the property is properly valued.

"Will you please advise me if this Section of the law applies or if the Board may sit according to Section IX which says, The County Board of Equalization shall serve during the Months of March, April, June and July of each year and at such other times as the County Board of Review have heretofore been required to serve. And for such services shall be paid at the rate of \$5.00 per day, but in no case shall the amount paid exceed \$400.00 per year for each member of the Board.

"The Marengo County Board of Equalization feels that 19-days is not enough time for them to complete this work and does not believe it was the intention of the legislature to so restrict the time allowed to serve as to make a farce of the Tax Equalization Board in small Counties.

"This Board met on the 1st day of March and has been at work 3-days when I called their attention to the law and stopped them, please let me have your opinion before Monday, March 11th."

In my opinion there is no conflict between the provisions of Section IX of Act No. 143, S. 14, approved March 15, 1939, General Acts, 1939, p. 178, and Section XIV of said Act.

Section IX of Act No. 143, supra, in so far as it applies to Marengo County, reads as follows:

"The annual term of service and compensation of the members of the several County Boards of Equalization, as created by this Act, shall be as follows: * * *

"In those counties in which the total assessed value of all taxable property does not exceed ten million (\$10,000,000) dollars, according to the tax assessor's abstract of assessments for the year 1938, the members of the County Board of Equalization shall serve during the months of March, April, June and July of each year, and such other times as the members of the County Boards, of Review have heretofore been required to serve and for such services shall be paid at the rate of five (\$5.00) dollars per day for the actual time served, but in no case shall the amount paid for such service exceed four hundred (\$400.00) dollars per annum to each member of said Board."

It is clear from the above that the County Board of Equalization of your county shall serve during the months of March, April, June and July of each

year, and "at such other times as the members of the County Board of Review shall have heretofore been required to serve." **Quarterly Report Attorney General**, Vol. XV, page 13.

Section XIV of Act No. 143, supra, reads as follows:

"Section XIV. When the assessor shall have completed the assessment, valuation and equalization work in his county as provided by law, he shall notify each member of the Board of Equalization and such board shall meet on the second Monday in March and sit at the courthouse of the county from day to day until their duties are completed, which shall not be later than the first Monday in April, and shall review, revise, correct and fix the assessment values made by the tax assessor by raising or lowering the assessment of any person, partnership, corporation or association, except such assessments as have been approved by the State Department of Revenue, as to any or all of the items of his assessment, in such manner as to secure the assessment of property at sixty per cent of its fair and reasonable market value. The majority of a Board of Equalization shall govern in fixing the value for assessment of all property before them for determination."

The duties imposed on the Board of Equalization by the above quoted Section XIV are, that on and after the second Monday in March the Board shall sit for the purpose of reviewing, revising, correcting and fixing the assessment values made by the Tax Assessor by raising or lowering such assessments. Under the provisions of Section XIV, the work of reviewing and revising, correcting and fixing the assessment values, either by raising or lowering the same, must be completed by the Board on or before the first Monday in April. The time within which these duties must be performed is the same as that heretofore allowed by law for the performance of the same duties by the old Boards of Review. See Section 72 of the 1935 Revenue Act. After the Board has completed the work of reviewing or revising the assessment values, which must be completed on or before the first Monday in April, then the Board proceeds to perform the other duties imposed upon it by law.

It is, therefore, my opinion that there is no conflict between the provisions of Section IX and Section XIV of Act No. 143, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 11, 1940.

Hon. J. P. Mitchell,
Judge of Probate,
Henry County,
Abbeville, Alabama.

Poll tax—Exemption—Ex-soldiers—

Draftee selected for military service by Local Draft Board, who, upon reporting to military camp or post, was assigned to military duty and actually honorably served seventy-five days in the armed forces of the United States between January 1, 1917, and November 11, 1918, is exempt from payment of poll tax under amendment to the Constitution of Alabama proclaimed ratified November 15, 1924.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of February 20, 1940, in which you request my opinion as follows:

"Under date of April 27, 1939 an opinion was rendered by your office directed to Hon. J. Lee Smith, Judge of Probate, Clanton, Alabama, this said opinion appearing on Pages 64 and 65 of Volume 15, Reports of Attorney General for period April 1, 1939 through June 30, 1939, with references to Veterans Exemptions from Poll Tax. Among other things this opinion contains the following: 'Inasmuch as the person mentioned in the discharge from draft was never inducted into the armed forces of the United States, he does not come within the exemption provisions. * * *'

"I would thank you to examine the enclosed certificate of discharge and advise me if this person is eligible to be exempted from the payment of Poll Tax. I wish to respectfully call your attention to the fact that his service in the United States army consisted of 75 days, that he was paid the \$60.00 bonus and an additional sum of \$89.02. This seems to me to reveal that this man was actually in the armed forces of the United States for a short period."

In my opinion, under the facts disclosed by you, the draftee named in the discharge certificate was actually inducted into and honorably served in the armed forces of the United States, and, ergo, comes within the class exempted from payment of poll tax by the amendment to the Constitution of Alabama which was proclaimed ratified November 15, 1924, by reason of his honorable service in the armed forces of the United States between January 1, 1917, and November 11, 1918, (Michie's 1936 Cumulative Supplement to the Alabama Code of 1928, Constitution, Amendment XIV).

This conclusion is based upon the fact that, according to the statement in your request for opinion and from the discharge certificate attached thereto, it appears that the person named in the discharge certificate was selected for the military service of the United States by the Local Draft Board for Barbour County, Alabama, on the 9th day of August, 1918; and that pursuant to orders of said Board he reported to Camp Sevier, S. C., and actually remained at said post until the 22nd day of October, 1918—a period of seventy-five days—before he was discharged. See Biennial Report of Attorney General, 1932-34, p. 151. It also appears that he was paid \$60 "Bonus" on discharge. From the length of time intervening between the date of his arrival at the camp to report for military duty and the date of his discharge, I would assume in the absence of a showing to the contrary, that he was accepted for military service and assigned to military duty. However, the payment to him of the \$60 Bonus on discharge, authorized by

Section 1406 of Chapter 18, 40 U. S. Statutes at Large, p. 1151, dispenses with the necessity of such an assumption. By the terms of the statute, supra, the payment of the \$60 "Bonus" upon discharge was limited to "persons **serving** in the military or naval forces of the United States during the present (world) war, etc."

The criterion for determining whether or not a draftee was inducted into the armed forces of the United States is:

Was he actually accepted for service in the armed forces of the United States and assigned to some military duty?

The fact that he was selected for military service by the Local Draft Board and, pursuant to its orders, reported to a military camp or post for service is not, standing alone, sufficient. If, upon physical examination or for other reason found to exist at the military camp or post, **before being accepted for military service and before being assigned to any duty in connection therewith**, he had been discharged from the draft, he would not have been "inducted into the armed forces of the United States." If, however, upon reporting to a military camp or post, he was accepted for service and assigned to military duty, (although upon subsequent physical examination or for other reason, it developed that he was not subject to military duty and was entitled to discharge) he was in fact "inducted into the armed forces of the United States" and is, therefore, entitled to exemption from payment of poll tax.

As requested by you, the certificate of discharge attached to your request for opinion is returned herewith.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 11, 1940.

Hon. Chris J. Sherlock,
Director, Highway Department,
Montgomery, Alabama.

State Highway Department—

State Highway Department may purchase motion picture camera outfit to record construction operations of that department.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 9, 1940, in which you request my opinion as follows:

"This Department wishes to purchase a Motion Picture Camera outfit, complete with sound apparatus.

"This equipment will be used to serve two purposes of equal importance, namely to record actual construction operations of this Department, and create a file of information for study and use in the progressive science of road and bridge construction, and for educational work in showing the activities and work of this Department.

"Please advise whether this Department has the legal right to purchase this equipment, and the necessary supplies in order to operate same."

It is my opinion that your inquiry should be answered in the affirmative.

Section 1397(37) of Michie's Code of Alabama, 1928, reads as follows:

"1397(37). Highway department may construct or purchase buildings, tools, etc.—The State Highway Department is authorized to rent, construct, or purchase such buildings, stock, machinery, tools, materials and other equipment as it may find necessary for use in carrying out the provisions of this article and pay for the same out of the State Highway Fund. It shall also pay out of said fund the necessary expenses of the department of every description including traveling expenses of the officials and engineers, superintendents, foremen, and clerks, etc., while in the actual performance of their duties authorized or imposed by this article and also the cost of all supplies or materials furnished for said department and for the maintenance of all live stock and machinery used by the department or its agents."

Subsequent to this enactment, the powers herein were transferred to the State Highway Commission, and still later were transferred to the newly created State Highway Department in Section 3 of Act No. 13, S. 23, approved February 3, 1939 (General Acts, 1939, page 9), which reads as follows:

"Section III. Wherever in the laws of the State of Alabama the terms, 'State Highway Department' or 'State Highway Commission' are used, the same shall mean the 'State Highway Department'. All the rights, duties, powers and authority now or hereafter vested by law in the State Highway Department, in the State Highway Commission and the members thereof are hereby transferred to and vested in the State Highway Department, and all rights, powers, duties and authority, whether clerical, executive, administrative, judicial or quasi-judicial, now vested by law in the State Highway Department or in the State Highway Commission or in the members thereof, shall be vested in the State Highway Department hereby created, and shall be exercised by it together with any additional rights, powers and duties as hereafter may be provided by law."

From the above it is seen that all of the authority of the State Highway Commission is transferred to the State Highway Department. It also appears that the State Highway Department has the authority to purchase equipment which it finds necessary to the efficient performance of its duties and functions.

Under Section 1397(18) of Michie's Code of 1928, it appears that one of the specific duties of the State Highway Department is to investigate and determine the methods of road construction best adapted to the various sections of the State.

It is my opinion that Highway funds may be legally expended for the purpose of purchasing such a camera outfit as described in the letter of inquiry, if in your opinion its use will be of material assistance in the scientific study of road and highway construction in this State. 29 C. J. 565.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 11, 1940.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

1. An unsuccessful plaintiff, who is a minor, is not liable for costs.
2. The prochein ami of such a minor is chargeable for costs in such a case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 6, 1940, in which you request my opinion as follows:

"I respectfully request your opinion on the following question, viz:

"In a civil cause wherein John Doe, Jr., a minor over the age of nineteen, suing by and through John Doe as his father and next friend vs. Richard Roe the said cause is dismissed on motion of the plaintiff and the plaintiff is taxed with the costs of court.

"In view of the above would both the said minor plaintiff and his father be liable for the costs of court, or would just the father be liable for said costs?"

It is my opinion that a minor is not liable for costs in a case such as set out in your letter of inquiry.

In the case of *Perryman v. Burgster*, 6 Porter 99, it was said as follows:

"An infant plaintiff is not liable for costs. His prochien ami, who voluntarily represents him, is chargeable."

The cases seem to be uniform in holding that in such a case the next friend is the one from whom costs must be collected where the plaintiff fails in the suit. **Perryman v. Burgster**, supra; **Hughes v. Hughes**, 44 Ala. 698; **Smith v. Gaffard**, 33 Ala. 168.

The cases cited in this opinion are rather old, but my investigation shows that the rules laid down therein have not been changed by the Supreme Court of this State in later decisions.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 12, 1940.

Hon. C. C. Moseley,
Supt. Anniston Public Schools,
Anniston, Alabama.

Taxation—Sales Tax—Exemptions

Purchases by City Board of Education.

Sales of materials for use in maintenance, upkeep, repair or replacements of public school buildings and property belonging to a city or town are not subject to the sales tax imposed by Act No. 18 H. 82, approved February 8, 1939 (General Acts 1939, page 16) and Section V of said Act, as amended by Act No. 371, H. 365, approved September 23, 1939 (General Acts, 1939, p. 498).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for an official opinion dated March 7, 1940, which follows:

"The plumbers of Anniston do quite a bit of repair and replacement work in the Anniston Public Schools. All of the Anniston Public School Buildings belong to the City of Anniston.

"Should plumbers charge the Anniston Public Schools sales tax on repairs and replacements? I thank you."

Your question is answered by an opinion of this office rendered on April 14, 1937 to Hon. J. A. Keller, Superintendent, Department of Education, with reference to the so-called Luxury Tax Act of 1937. **Biennial Report Attorney General**, 1936-38, page 172.

I quote from the opinion as follows:

"If a city owns a building which houses either the elementary or high school or both, items bought for repairs of buildings would be exempt from tax because the cities or towns are exempt."

Act No. 18 H. 82, approved February 8, 1939, generally known as the Sales Tax Act (General Acts 1939, page 16, Section V(b) expressly exempts from the tax all sales to the State of Alabama, the counties within the State, and incorporated municipalities.

Section V of the Act was amended by Act No. 371, H. 365, approved September 13, 1939 (General Acts 1939, page 498) and the exception was carried forward into this amendment.

I enclose herewith a copy of the opinion referred to above, which deals at length with the exemption of schools from payment of the sales tax.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 12, 1940.

Hon. John Brandon,
Secretary of State,
Capitol.

The title "Judge" should not be placed on the ballot before the name of a candidate for a judgeship.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of March 6, 1940, in which you request my opinion as follows:

"A candidate for a circuit judgeship, while he has not qualified with me with the annexation of the title 'Judge' to his signature, has qualified with the Chairman of the State Democratic Executive Committee with the annexation of the word 'Judge' to his signature.

"Please advise if a candidate may qualify with the annexation of a title to his signature. Please also advise me if the name of a candidate so qualifying with the Chairman of the State Democratic Executive Committee should be certified by said Chairman to me and should I, in turn, so certify the name to the probate judge in order that it may be placed upon the ballots."

It is my opinion that the title "Judge" is not a part of one's legal name and should not be placed upon the ballots in a primary election as a part of his name.

Section 8 of Act No. 56, H. 53, approved February 25, 1931, General Acts, 1931, page 75, provides as follows:

"Section 8. The Chairman of the State Executive Committee of the parties entering such primary election shall, at least forty days prior to the holding of the same, certify to the Secretary of the State of Alabama the names of all candidates running for State, National, circuit and district offices, State Senators and Members of the Legislature and all other candidates except candidates for county offices, and the Chairman of each County Executive Committee of the parties entering such primary election shall, at least forty days prior to the holding of the same, certify to the Probate Judge of the county the names of all candidates for County offices, and the Secretary of State shall, within not less than Thirty days prior to the time of holding such primary elections, certify to the Probate Judge of any county where an election is to be held for any particular office the names of the candidates for such office, and the Probate Judge of each County in Alabama shall in the manner and form hereinafter set forth prepare or have prepared all ballots voted in such primary election; provided, that the Probate Judge shall have said ballots so printed that the names of the opposing candidates for any National or State office to be voted for by the voters of more than one county shall, as far as practicable alternate in position upon the ballots to the end that the name of each candidate shall occupy with reference to the name of every other candidate for the same office, first position, second position, and every other position, if any, upon an equal number of Ballots, and, when printed, said ballots shall be distributed impartially and without discrimination by the Probate Judge."

You will notice that the above section provides that the "Chairman of the State Executive Committee shall certify to the Secretary of the State of Alabama the names of all candidates * * *" and the "Secretary of State shall * * * certify to the Probate Judge * * * the names of the candidates."

A person's legal name consists of one or more Christian or given names and one supreme or family name. **Blakeney v. Smith**, 183 So. 920, 183 Miss. 151. It has been held that the designation "Doctor" is a title and no part of one's name. **Hamilton v. Shredded Wheat Sales**, 172 A. 614, 54 R. I. 285; **Gears v. State**, 176 N. E. 553, 203 Ind. 3.

It was held by the Supreme Court of Ohio in the case of **State ex rel. Whetsell v. Murphy**, 174 N. E. 252, where the letters "M. D." were appended after the name of a coroner candidate, that "It is unlawful to place any characterization or designation either before or after the name of a candidate upon a ballot, either in the primary or general election, where there is not such identity in the names of two or more candidates as to justify some description which will permit the voter to make an intelligent expression of his choice." I further call your attention to an annotation in 93 A. L. R. 911, which deals further with this question.

Therefore, the premises considered, it is my opinion that the title "Judge" should not be placed before a candidate's name on the ballots in a

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primary election, and such title should not be certified to the Secretary of State by the State Democratic Executive Committee as part of the candidate's name, nor should it be certified by the Secretary of State to the Probate Judge as a part of the candidate's name.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 12, 1940.

Hon. P. B. Hamilton,
Chairman, Personnel Board,
Mobile County,
Mobile, Alabama.

Mobile County Civil Service System—

Director may authorize provisional appointment and successive provisional appointments of the same man for a total of not more than 120 work days until establishment of eligible register and appointment therefrom. Section XVIII of Act No. 470, H. 952, approved September 15, 1939 (Local Acts, 1939, pp. 298-309).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 5, 1940, in which you request my opinion as follows:

"We will very much appreciate it if you will refer to our local merit system act and advise us your opinion as to whether, under Section 18 on Provisional Appointments, provisional appointment of the same man can be made for a total of 120 work days."

In my opinion, Section XVIII of the Mobile County Civil Service Act (Act No. 470, H. 952, approved September 15, 1939, Local Acts, 1939, p. 298) permits provisional appointments of the same man for a total of 120 work days.

Section XVIII provides as follows:

"Section XVIII. PROVISIONAL APPOINTMENTS: Whenever in the opinion of the Director it is impossible within a reasonable time to certify eligible persons for appointment to a vacancy in the Classified Service, the Appointing Authority may nominate a person for the vacancy to the Director. If such nominee is found by the Director to have had experience and training which appear to qualify him for the position, the Director may authorize the Appointment of such person to such

vacancy only until an appropriate eligible Register can be established and Appointment made therefrom. In no event shall a Provisional Appointment be continued for more than 60 work days. Successive Provisional Appointments of the same person shall not be made, except upon approval of Director as herein provided, and in any event no such Provisional Appointment shall be made for periods aggregating more than 60 work days."

You will note from the language of the foregoing section that the purpose of allowing provisional appointments is to permit the filling of vacancies during such time as no eligible register is in existence and only until an appropriate eligible register can be established and appointment made therefrom.

It is then provided that in no event shall a provisional appointment be continued for more than sixty work days. If the section ended at this point, of course, there could be no provisional appointment for more than sixty work days. However, the section continues with a provision for successive provisional appointments, and provides that successive provisional appointments may be made upon the approval of the director. Then follows the statement "in any event no **such** provisional appointment shall be made for periods aggregating more than 60 work days." (Emphasis supplied). In my opinion, the key word in this quoted clause is the word "such", which patently refers to the words "successive provisional appointments", a part of the same sentence. With this construction in mind, it, therefore, appears that successive provisional appointments of the same person may be made with the approval of the director as provided, but in no event shall such successive provisional appointments be for periods aggregating more than sixty work days.

In short, Section XVIII permits a provisional appointment for sixty work days and successive provisional appointments which may be for periods shorter than sixty work days but in no event shall such short periods aggregate more than sixty work days. This provision for provisional appointments and successive provisional appointments, in my judgment, permits the provisional appointment of the same man for a total of 120 work days.

What has been said above is, of course, limited by the provision of Section XVIII that should an appropriate eligible register be established and should it be possible to make appointment therefrom before the end of such 120 work days, then such provisional appointment would of necessity terminate.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Hon. T. C. Garner,
Treasurer, Jefferson County,
Birmingham, Alabama.

March 13, 1940.

Traveling Expenses—

Assistant Examiners of Public Accounts entitled to per diem when on official business in another municipality even though in same county (Act No. 121, H. B. 390, approved April 10, 1933, General Acts of the Extra Session of 1933, page 114).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 4, 1940, in which you request my opinion as follows:

"I wish to direct your attention to House Bill 390 by Holland on page 114 of the General Acts at the extra Session 1933 Legislature in which the provisions of Section I are:

"The Assistant examiners of Public accounts shall be reimbursed their actual transportation expenses and in addition thereto shall be paid the sum of three dollars (\$3.00) for traveling expenses while away from their homes on official business, provided that they shall not draw any sum for expenses except when away from their homes on official business."

"It has been the custom for Jefferson County to reimburse the State for per diem drawn by Examiners working and residing in Jefferson County. Please advise me as to the following:

"Is an Assistant Examiner of public accounts entitled to the per diem provided in the above Section, who lives in one municipality and is on official business in another municipality of the same county?"

In my opinion, your inquiry should be answered in the affirmative.

The 1933 act concerning which you inquire, and which you have set out in your inquiry (Act No. 121, H. B. 390, approved April 10, 1933, General Acts, Extra Session, 1933, p. 114) permits the assistant examiners to be paid the sum of \$3.00 for traveling expenses while "away from their homes on official business."

The language employed by the Legislature is clear and unambiguous. There is no requirement, either expressed or implied, that the examiner must be absent from the county of his residence before being entitled to the per diem allowed. Certainly, one who is in another municipality on official business is "away from home." Cf. Informal opinion written to Hon. B. P. Singleton, Chief Examiner of Accounts, Capitol, under date of January 5, 1940, a copy of which is enclosed for your convenience.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 14, 1940.

Hon. F. E. St. John, Chairman,
Democratic Executive Committee,
Cullman County,
Cullman, Alabama.

Offices—State Board of Embalming—

The office of member of the State Board of Embalming is not an office of profit under the State within the meaning of Section 280 of the Constitution of 1901.

Such member is not disqualified to hold the office of Coroner. Constitution of 1901, Section 280; General Acts of 1931, page 822.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for an official opinion under date of March 2, 1940, which follows:

"As Chairman of the Democratic Executive Committee of Cullman County, the candidates for the coming Democratic primary qualified before me and one candidate's qualification presents this question, which he desires that I get an opinion from you covering the same:

"This person holds an office by appointment by the Governor as member of the Alabama State Board of Embalmers. He has qualified for coroner of Cullman County subject to the action of the Democratic primary and we desire to know whether or not the holding of said office of member of Alabama State Board of Embalmers and coroner of Cullman County contravenes Section 280 of the Constitution of Alabama."

The State Board of Embalming was established by Act No. 696, S. 247, approved July 31, 1931 (General Acts, 1931, page 822), to consist of five members, one of whom is appointed each year by the Governor and each of whom holds office for a term of five years and is subject to removal by the Governor for cause (Sections 1 and 2).

The Board is empowered, inter alia, to regulate the practice of embalming and to license embalmers. Its revenues arise from license fees exclusively, to be paid by applicants for license and by licenses annually.

Section 5, so far as pertinent, reads in part as follows:

"All expense, salary, and per diem to members of this board shall be paid from fees received under the provisions of this chapter and shall in no manner be an expense to the state. All moneys received in excess of said per diem allowance and other expenses provided for, shall be held by the said board as a special fund for meeting the expenses of said board."

It has been said that "any State, county, and municipal office whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the State, the term and salary or perquisites of which are fixed by law, is an office of profit within the purview and meaning of Section 280 of the Constitution of 1901." *State ex rel. Glenn v. Wilkinson*, 220 Ala. 172, 174, 124 So. 211.

In *Montgomery v. State*, ex rel. Enslen, 107 Ala. 372, 18 So. 157, it was said:

"There are three principal tests for determining whether one performing duties of a public nature is a public officer, in the sense of subjecting his incumbency or employment to a quo warranto proceeding: First, whether the sovereignty, either directly through legislative enactment or executive appointment or indirectly, as through a municipal charter, is the source of authority; Second, **whether the duties pertaining to the position are of a public character**,—that is, due to the community in its political capacity; and third, whether the tenure is fixed and permanent for a definite period fixed by law, unless for neglect of duty or malfeasance, or subject to termination at the will of others without the assignment of cause."

The Alabama cases discussing the meaning of "office of profit" within the constitutional inhibitions have turned upon the nature of the duties performed by the holder of the office, and have been decided upon a consideration of whether the office was really an employment or involved the exercise of some part of the sovereign power of the State, either executive, legislative or judicial. *State ex rel. Glenn v. Wilkinson*, supra; *State ex rel. Horn v. Wilkinson*, 220 Ala. 38, 124 So. 213; *State v. Sanders*, 187 Ala. 79, 65 So. 378.

Manifestly a member of the Board of Embalming does exercise some part of the sovereign power of the State in that he and his four fellow-members have complete control and supervision over the matter of admitting persons to practice the art of embalming within the State on the theory it involves the public health and safety. It is also true that such member's term of office is fixed by statute. Therefore, in two respects at least it may be said that he holds an office of profit, as above defined, provided it may be said that his salary, compensation or perquisites of office are also fixed within the meaning of the definition.

I am of the opinion, however, that inasmuch as the statute creating this office does not expressly or by necessary implication fix any salary, compensation or perquisites or emoluments in connection therewith, and inasmuch also as it is not within the power of the members themselves, as a board, to fix their compensation, if any, the third essential requirement of an office of profit is lacking.

In *Mobile County v. Williams*, 180 Ala. 639, 657-658, 61 So. 963, it is said:

"A public officer, as we have already said, accepts his office with all of the burdens which the law imposes upon the incumbent of that office. He knows, when he accepts the office, what its perquisites are, and he must, with diligence, perform all of the duties of the office for the fees which the law attaches to the office. If the law imposes upon

the incumbent of an office duties for which it provides no fees or other compensation, he must perform those duties, and for performing them he can neither demand nor receive any compensation whatever."

See also **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235.

Inasmuch, therefore, as the salary is not fixed by statute, and cannot in fact lawfully be fixed at all without legislative enactment, I am of the opinion that a member of the Board is not holding an office of profit and may, at one and the same time, hold the office of Coroner. See **Baker v. Board of Cook County Commissioners**, 9 Wyo. 51, 59 Pac. 797; Quarterly Report of Attorney General, Vol. VII, page 143.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 14, 1940.

Hon. J. C. Kellett,
Judge of Probate,
DeKalb County,
Fort Payne, Alabama.

Elections—Voters Lists—DeKalb County—

Act. No. 255, H. 405, which became a law under Section 125 of the Constitution on August 30, 1939 (Local Acts, 1939, page 147) held not to apply to publication of list of qualified electors by probate judge.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 9, 1940, in which you request my opinion as follows:

"Will you please give an official opinion as to whether or not it is necessary for the Judge of Probate, or Board of Revenue of this county to let the publishing of the voters' list as required by law, under bids in accordance with Local House Bill Number 405 by Beck, which was approved and became a law August 30, 1939.

"I hope you can give this your early attention as it must be given to the printer at an early date."

In my opinion, your inquiry should be answered in the negative, that is, it is not necessary for bids to be taken for the publication of the list of qualified electors by the probate judge.

I have carefully read Act No. 255, page 405, which became a law under Section 125 of the Constitution on August 30, 1939 (Local Acts, 1939, page 147), and find no provision which, in my judgment, requires the taking of bids for publication of a list of qualified electors, which the probate judge is required to make in April of every even numbered year by Section 387 of Michie's Code of Alabama, 1928.

The only provisions in the local act, supra, which it might be contended require the taking of bids for the publication of such list, are the provisions in Section 12 thereof requiring bids to be taken before supplies, etc., are purchased for the county by the county governing body. It suffices to say that the provisions of this section do not apply to the publication of the list of qualified electors for the reasons that it is not a purchase of supplies, etc., for the county and is done by the probate judge and not by the county governing body.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 14, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
State of Alabama,
Capitol.

Corporations not of a business character—Permit fees—Sections 7167 et seq., Code of 1923.

Corporations of a benevolent, educational and religious character organized under the provisions of Article 23, Sections 7167-7192, Code of 1923, are not liable for the payment of annual corporation permit fees imposed by Section 316 of the Revenue Act of 1935.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for an official opinion bearing date of February 16, 1940, which follows:

"Sections 315 and 316 of the 1935 Revenue Act provide for the payment of a permit fee by foreign and domestic corporations for the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other purposes, the names and addresses of the said corporations and individual officers thereof."

"Neither of the sections above referred to contain any provision for the exemption of any corporation of any class or character."

"The question constantly arises as to whether or not corporations chartered under the provisions of Section 7167, Article 23, of the Code of 1923, are required to obtain the permits provided for by Section 316 above referred to, in view of the exemption provisions found in Sections 7185-7192 of Article 23 of the Code of 1923.

"In view of the fact that the 1935 Revenue Act was enacted subsequent to the adoption of the Code of 1923, and in view of the specific limitations as to exemptions which are set out in the 1935 Revenue Act, we find a considerable difference of opinion as to whether or not the corporations chartered under the provisions of Section 7167 of the Code of 1923 are required to pay the annual permit fee provided for by Section 316 of the 1935 Revenue Act.

"We would thank you to give us your opinion in the premises."

It is my opinion that corporations, not of a business character, organized under the provisions of Article 23 of the Code of 1923, which article is composed of Sections 7167-7192, inclusive, are not liable for the payment of the annual corporation permit fee imposed by Section 316 of the Revenue Act of 1935. Section 7167 and Section 7168 of the Code of 1923 read respectively as follows:

"7167. The members of any church, or conferences of churches, or religious society, or educational society or benevolent, monument or burial society, patriotic society, or societies for the purpose of nature study or scientific research or society for establishing public parks, or places of public recreation, or societies for promoting knowledge, promoting arts, promoting sciences, or societies for purposes of like kind, or the owners of a graveyard, or the trustees of any of the foregoing churches, conferences, institutions, or societies, elected by the organization or organizations of the church, conferences, institution, association, or society, desiring to become incorporated, shall adopt a resolution signifying such intention and elect not less than three, nor more than twenty-four trustees."

"7168. Such trustees shall, within thirty days after their election, file in the office of the judge of probate of the county in which the corporation is to exercise its functions, or part of its functions, a certificate stating the corporate name selected, the names of the trustees, and the length of time for which they were elected; which certificate shall be subscribed by them, and recorded. The members of such society, their associates and successors are, from the filing of such certificate, incorporated by the name therein specified."

It will be noted from Section 7167, *supra*, that all of the groups or societies which are authorized to incorporate under the provisions of Article 23 are either groups or societies of a benevolent, educational or religious character.

Your attention is called to Section 229 of the Constitution of 1901, which expressly exempts corporations of a benevolent, educational or religious character from the payment of franchise taxes imposed by law. Section 317 of the Revenue Act of 1935, which imposes a franchise tax on corporations, also expressly exempts such benevolent, educational and religious corporations from the payment of the franchise tax thereby levied.

It will be noted that the amount of the annual corporation permit fee imposed by Section 316 of the Revenue Act of 1935 is measured by the same yardstick as the franchise tax imposed by Section 317, supra, i. e., the amount of the capital stock of the corporation. It is true that the fee imposed by Section 316, supra, is called a "permit fee," but in truth and in fact, this fee is, in my opinion, a tax in the nature of a franchise tax. The fact that the Legislature has designated this fee as a "permit fee" is not conclusive, and the courts may look to its true nature to determine its character. **Kendrick v. State**, 142 Ala. 143, 39 So. 203; **State v. City of Montgomery**, 228 Ala. 93, 151 So. 856.

It is, therefore, my opinion that corporations formed under the provisions of Article 23, supra, are exempt from the payment of the annual permit fee imposed by Section 316 of the Revenue Act of 1935.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 18, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Board of Veterinary Medical Examiners—

Liability of Secretary-Treasurer for misuse of funds—

Secretary-Treasurer of Board of Veterinary Medical Examiners held liable personally, in absence of bond, for failure to collect and expend funds of Board of Veterinary Medical Examiners, as provided by law.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 30, 1940, in which you request my opinion as follows:

"Please refer to your ruling under date of January 29, 1940, addressed to me, pertaining to the State Board of Veterinary Medical Examiners. In this ruling, in answer to questions two and three, you ruled in the negative.

"In view of your holding that the State Board of Veterinary and Medical Examiners can not legally expend any of its funds for the purpose of purchasing a memorial for a deceased former member, and can

not legally accept notes in lieu of cash in order to allow graduates of the School of Veterinary Medicine at Auburn to take Board's examination, please advise me in answer to the following question:

"If the Board or Secretary-Treasurer expended any of its funds for the purchase of a memorial for deceased former member, and if the Board or the Secretary-Treasurer accepted notes in lieu of cash, as outlined above, would not the Secretary-Treasurer be liable personally and on his official bond for such amounts so expended and so represented by the notes accepted?"

In reply, I wish to advise that I find no provision of law requiring a bond to be made by the officer considered. It is my opinion, however, that such officer is liable personally for ministerial acts of the nature named by you, when such acts are not authorized by law. **Pickett v. Richardson**, 223 Ala. 683, 138 So. 274.

In my opinion, the Secretary-Treasurer named by you is liable personally, and if he has a bond, his sureties are liable thereon, for the failure to collect and expend moneys of the Board of Veterinary Medical Examiners according to law.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 18, 1940.

Hon. I. C. Heck,
State Comptroller,
Capitol.

State—County Board of Education—Claims—

The State, which has obtained certain moneyed judgments against a county board of education, may withhold poll tax moneys due said county board of education to the extent of an amount of money equal to the amount of the unpaid judgments.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 21, 1940, in which you request my opinion as follows:

"The Jefferson County Board of Education owes the State of Alabama \$38,603.96 for the period from December 1, 1935, to January 6, 1940, and an additional estimated amount of \$1,200.00 for accruals since January 6, 1940, for the State tax of 6c per gallon on gasoline bought in tank car lots, on which gasoline the consignor did not pay the tax.

"The State of Alabama secured a judgment against the Jefferson County Board of Education for \$15,225.88, to cover this 6c gasoline tax to May 31, 1937, which judgment was affirmed by the State Supreme Court. The State secured another judgment against the Jefferson County Board of Education of \$9,783.82 to cover this gasoline tax for the period from July 1, 1937, to September 30, 1938, which case is now pending before the State Supreme Court.

"The State has made repeated demands on the Jefferson County Board of Education for the above amount, but has been unable to make collection on any part of this debt.

"Please give me your official opinion as to the legality of the Comptroller withholding payments to the Custodian of the Jefferson County Funds, for the use of Jefferson County Board of Education, of sufficient funds to cover the above claim from poll tax collections in Jefferson County from October 1, 1939, through February 1, 1940, inclusive."

I am of the opinion that your inquiry should be answered in the affirmative, subject to the qualification set out below.

The State has the right to set-off or counterclaim in an amount due the State against one who claims moneys from the State. See 59 *Corpus Juris* 320, and cases therein cited.

This office, in an opinion rendered to the State Highway Director on September 7, 1939 (Quarterly Report of Attorney General, Vol. XVI, page 216), held that the State may claim as a set-off against an individual the amount due the State for ad valorem taxes and withhold payment to the extent of the amount due the State. The principle of this holding is clearly applicable to the situation in the instant case. It appears that the County Board of Education of Jefferson County owes the State of Alabama certain moneys under two judgments rendered in the Circuit Court of Jefferson County, Alabama, one of which has been affirmed by our Supreme Court, and the other now pending therein on appeal. The State of Alabama owes the County Board of Education of Jefferson County certain poll tax moneys. In my opinion, the State can withhold the poll tax moneys due the Jefferson County Board of Education to the extent of an amount equal to the amount of the unsatisfied judgments the State holds against the Jefferson County Board of Education. However, in the case that is now pending on appeal, the outcome thereof will determine ultimately the right of the State to withhold monies equal in an amount to said judgment.

The fact that the poll tax moneys which the State holds is considered as a trust fund is immaterial. Our Supreme Court has affirmatively decided that the poll tax moneys may be used for the purpose of paying State gasoline tax by county boards of education. *County Board of Education of Jefferson County v. State ex rel. Carmichael, Attorney General*, 237 Ala. 434, 187 So. 414; *State Tax Commission v. County Board of Education of Jefferson County*, 235 Ala. 388, 179 So. 197. The judgments in the two instant cases were for gasoline tax due the State by the County Board of Education of Jefferson County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 19, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Officers—Salary increase—

County treasurer entitled to receive additional compensation during term of office if additional duties are placed upon him.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of January 29, 1940, in which you request my opinion as follows:

"Please refer to Local Acts of 1923, Page 249, Local Act 1939, House Bill 891, by Mr. Scott, and advise me in answer to the following:

"1. Can the County Treasurer of Walker County receive an increase in compensation during his current term of office, or would it be in violation of Section 281 of the Constitution of Alabama for him to receive an increase?

"For your information, the term of the present County Treasurer of Walker County expires January 20, 1941. House Bill 891 became a law on September 14, 1939, without the approval of the Governor, under the provisions of Section 125 of the Constitution."

Section 281 of Article XVII of the Constitution of Alabama, 1901, reads as follows:

"281. The salary, fees, or compensation of any civil officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The effect of this provision of the Constitution is, of course, that one holding a "civil office of profit" shall not have an increase in his salary during his term of office. However, this provision does not prevent such increase or decrease in remuneration from becoming effective at a future term—only the term of the incumbent at the time of the passage of an act decreasing or increasing his salary is affected by this constitutional prohibition. **Hawkins v. Jefferson County**, 233 Ala. 49, 169 So. 720. Therefore there can be no question but that the term of officer following the expiration of the term in which he is now serving would be affected by the passage of an act increasing or diminishing his salary.

In the case of **Morgan County v. Fidelity & Deposit Co. of Maryland**, 200 Ala. 690, 77 So. 233, it was held that a county treasurer came within the meaning of Section 281 of the Constitution, *supra*, and that his salary could not be diminished or increased during the term of his office.

However, in the case of **Tayloe v. Davis**, 212 Ala. 282, 102 So. 433, it was held that the salary of officers coming within the provisions of Section 281 of the Constitution could be increased during their terms of office if there were additional duties required of said officers at the time of the increase in their salaries.

Therefore, your question as to whether or not the County Treasurer of Walker County can receive an increase in his compensation during his current term of office devolves into a question of whether or not the act which increases his salary placed additional duties upon him.

Act No. 382, H. 963, approved September 26, 1923, (Local Acts, 1923, page 249) provided for the salary of the County Treasurer of Walker County and also provided his duties therein. In Section 4 thereof his salary was fixed at \$1,500.00 a year. Act No. 362, H. 891, which became law on September 14, 1939, under Section 125 of the Constitution, (Local Acts, 1939, page 250) amended Act No. 382, supra, by changing Section 4 thereof in that the salary of the County Treasurer was increased to \$2,400.00 a year. In addition to the duties imposed on the County Treasurer by Act No. 382, supra, new duties of the County Treasurer are set out in Section 2 of Act No. 362, supra, which are as follows:

1. Assist in the preparation of the budget.
2. Supply the Board of Revenue with a monthly statement.
3. Make an annual report.

At this point, permit me to point out that in Section 2 of Act No. 382 (the original act) it was provided that the duties of a County Treasurer, as set out in Section 300, et seq. of the Code, were also to be applicable to the County Treasurer of Walker County. However, the duties as supplied in Act No. 362, the amending act, are over and above those duties set out in the Code sections cited above. In other words, the act which raised the salary of the County Treasurer of Walker County placed upon him duties which were not placed upon him by Act No. 382, supra, including Code Section 300.

Therefore, it is my opinion that the County Treasurer of Walker County is entitled to receive the additional compensation provided for in Act No. 362 from the date of its becoming a law, since this act placed additional duties upon him.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 19, 1940.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Counties—Probation Officers—State Board of Pardons and Pa-
roles—

There is no authority for the County Board of Revenue or other like governing body of the county to purchase a desk, chair, typewriter, etc. for probation officer who is assigned to duty in such county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion bearing date of March 12, 1940, which follows:

"Please advise me if the Board of Revenue of Houston County, Alabama, has authority to purchase a desk, chair, and typewriter for the Probation Officer having charge of several counties in this District and who is stationed in the office of the Court Reporter here in the Court House in Dothan; and whose work is not only with probation cases in this County but in several counties in which he works and is assigned."

You are advised that I find no authority for the Board of Revenue of Houston County to purchase, and pay for, out of the county funds, a desk, chair, or typewriter for the probation officer appointed by the State Board of Pardons and Paroles, who is assigned to duties in your county. Before county funds may be legally expended, there must be some statutory authority for the expending of such funds. **Ensley Motor Co. v. O'Rear**, 196 Ala. 481, 71 So. 704; **Bice, County Treasurer v. Foshee**, 19 Ala. App. 421, 97 So. 764. Quarterly Report, Attorney General, Vol. XVI, page 198.

Your attention is called to the fact that the probation officers are appointed by the State Board of Pardons and Paroles under authority of Act No. 275, S. 186, approved August 25, 1939, General Acts, 1939, page 426, and are employees of the State Board of Pardons and Paroles. Probation officers are not employees of the county in any sense. I know of no statutory authority, either expressed or implied, for the county furnishing such supplies to probation officers.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 19, 1940.

Hon. Luther H. Waller, Member,
House of Representatives,
Montgomery, Alabama.

Licenses—Trailer Manufacturer or Dealer—

Trailer manufacturer, whether selling product through independent trailer dealers, or direct to consumer, not liable for trailer dealer's license under Schedule 22, as amended by Act No. 156, S. 75, approved March 2, 1937 (General Acts, Extra Session, 1936-37, page 178).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 7, 1940, in which you request my opinion as follows:

"Will you please give me your official opinion as to whether under the facts set out below a trailer manufacturer is liable for a 'dealer's' license?

"Is a manufacturer who is not in any incorporated city or town, but whose plant is located in the country, and who manufactures trailers, liable for a dealer's license if he sells his product through independent dealers who are not connected with him except to merchandise his product, and who do have licenses to sell trailers? Would he be liable for a dealer's license if, in addition to selling his product as set out above through independent dealers, he sold an occasional trailer from the plant direct to a person who applied to him for the sale thereof?"

The license schedule involved is Schedule 22, as amended by Act No. 156, S. 75, approved March 2, 1937 (General Acts, Extra Session 1936-37, page 178), which provides, as pertinent, as follows:

"Schedule—22. B.—Each person other than a licensee under Schedule 12, of Section 348 hereof for engaging in the business of dealing in Tractors, road machinery or trailers, shall pay the following license: In cities and towns of 50,000 inhabitants or over, State license of \$50.00, county license of \$50.00. In cities and towns of 25,000 inhabitants and less than 50,000, State license of \$40.00, county license of \$40.00. In cities and towns of 5,000 and less than 25,000, State license of \$20.00, county license of \$20.00. In all other places of less than 5,000 inhabitants, whether incorporated or not, State license of \$10.00, county license of \$10.00."

You will note from the foregoing schedule that the imposition is placed upon persons engaging in the business of "dealing in * * * trailers."

Our Legislature did not undertake to define the meaning of the word "dealing" and we are, therefore, relegated to the general rule stated by the courts that words in a statute are to be given their commonly understood meaning in the absence of a different intent appearing. 59 C. J. 977; *American Bakeries Co. v. City of Opelika*, 220 Ala. 388, 392, 157 So. 206.

Generally speaking, a "dealer" is not one who buys to keep or makes to sell, but one who buys to sell again. He depends for his profit, not upon the labor he bestows on his commodities but upon the skill and foresight with which he watches the markets. *Nash v. State*, 21 Ala. App. 613 (hn. 3), 110 So. 797; *American Bakeries Co. v. City of Opelika*, supra; *Carter v. State*, 44 Ala. 29; *Jordan Undertaking Co. v. State*, 235 Ala. 516, 180 So. 99; *Egan v. State*, 68 S. W. 273 (Texas). See also Words & Phrases, "Dealer," and 17 C. J. 1154, "Dealer."

Applying the foregoing principles to your inquiry, you are advised that, in my opinion, a manufacturer of trailers is not included within the license

schedule. Our courts have repeatedly held that in order to hold a taxpayer liable for a particular license or tax the business in which he is engaged must be plainly and unmistakably within the statute; and if there be a doubt whether the statute embraces it, that doubt is to be resolved in favor of the taxpayer. *State v. H. G. Fain Service Station*, 23 Ala. App. 239, 124 So. 119, cert. den. 220 Ala. 55, 124 So. 121; *Jefferson County v. Smith*, 23 Ala. App. 302, 421, 125 So. 401; *Hill Grocery Co. v. State*, 26 Ala. App. 302, 159 So. 269. If the Legislature had intended to tax manufacturers of trailers, they should have been explicit in using appropriate language or terms. This office will not by construction include taxpayers under the taxing statute unless they are expressly included by the statute, or unless the statute reveals by clear implication an intent to include them. I do not believe that a manufacturer was intended to be included within those liable for the license imposed by Schedule 22, as amended, *supra*, whether he sold the trailers through a party having a dealer's license or occasionally sold direct to the consumer.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 19, 1940.

Hon. E. Roy Albright, Chairman,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Manufacturer of malt or brewed beverages outside the State of Alabama may not be legally issued a license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of December 12, 1939, in which you request my opinion as follows:

"Objections having been made by the Alabama Wholesale Beer Distributors Association of Alabama to the issuance of a Wholesale Malt or Brewed Beverage License to the Atlantic Company for 1940, a hearing was held in the Board's office at its regular meeting beginning at 2:00 P. M. on December 7, both sides being represented by Counsel and by your office, Hon. Silas Garrett, Asst. Attorney General, acting in an advisory capacity to the Board.

"The objectors claimed that the Atlantic Company, a corporation of Fulton County, Georgia, was engaged in the business of operating a brewery and that the same officers and directors of the said Atlantic Company which, by an instrument or instrumental letters filed with the

Alabama Alcoholic Beverage Control Board on the first day of June 1937 and since periodically renewed, has qualified to do business in the State of Alabama as a Brewer or Manufacturer of malt beverages.

"The objectors further claimed that the said Atlantic Company of Fulton County, Georgia, having the same officers and directors and being one and the same identical concern had previously filed an application for and secured from the Alabama Alcoholic Beverage License which said License had been periodically renewed.

"The objectors further claimed that the Atlantic Company was operating contrary to the provisions of Law as set out expressly in sub-divisions (5)-(10) inclusive of Section 25 of the Alcoholic Beverage Control Act.

"The Atlantic Company did not deny that they were a corporation of Fulton County, Georgia, nor did they deny that they were operating under a Wholesale Malt or Brewed Beverage License in the State of Alabama. They did deny that they were qualified as a Manufacturer or Brewer in the State of Alabama.

"They further contended that the word 'Manufacturer' as defined in sub-section (k) of Section 2 of the Alcoholic Beverage Control Act clearly applied to Manufacturers licensed to manufacture in the State of Alabama and that they were not operating in violation of any section of the said Act as claimed by the Alabama Wholesale Beer Distributors Association.

"You are respectfully requested to consider sub-section (k) of Section 2 in conjunction with sub-section (a) of Section 23 and sub-section (5)-(10) inclusive of Section 25 together with any other provision of the Alcoholic Beverage Control Act which might have any bearing on the subject under consideration.

"You are specifically requested to advise, after considering the facts submitted and the Law, if, in your opinion, the Atlantic Company should be denied a License on the grounds of a violation of the Law or if, in your opinion, this Board should issue this Company a license for 1940 based on the fact that they are not in violation of the Law in operating their business as set out above.

"For your consideration and assistance, all papers in our files bearing on this subject are enclosed with this letter. After this file has served your purpose, we ask that you kindly return it to this office."

From your letter of inquiry, the records of the Alabama Alcoholic Beverage Control Board made available to me, and information adduced at the hearing before the Alabama Alcoholic Beverage Control Board referred to in your letter of inquiry, I think the facts may be succinctly stated as follows:

The Atlantic Company, a corporation, manufactures malt or brewed beverages in several states in the United States, but not in the State of Alabama. It has never applied for, or been granted, a license to manufacture malt or brewed beverages in the State of Alabama, nor has it ever manufactured malt or brewed beverages in the State of Alabama. Each year since

the passage of the Alabama Beverage Control Act, this company has applied for, and has been granted, a license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama. The Atlantic Company has applied, in the manner provided in the Alabama Beverage Control Act, for a renewal of its license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama for the year 1940. Objection to a renewal of the license of the Atlantic Company as a wholesaler or distributor of malt or brewed beverages in the State of Alabama has been made on the ground that the Atlantic Company is a manufacturer of malt or brewed beverages and is, therefore, not legally entitled to a license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama.

You desire my opinion on the correctness of this contention, i. e., you desire my opinion on the following question: If a manufacturer of malt or brewed beverages in other states, but not in Alabama, legally entitled to a license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama?

In my judgment, your inquiry should be answered in the negative.

The Atlantic Company contends that the definition of the term "manufacturer" contained in Section 2 of the Alabama Beverage Control Act, which is Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937 (General Acts, 1936-37, p. 40) is controlling and that the term "manufacturer" wherever used in the Alabama Beverage Control Act should be read or construed in the light of the definition of that term contained in Section 2 thereof; that when the term "manufacturer" is so read or construed, the Atlantic Company is not a manufacturer of malt or brewed beverages within the sense that such term is used in the Alabama Beverage Control Act; and that, therefore, it legally is entitled to a license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama.

The Alabama Beverage Control Act has been thoroughly and carefully studied, and the rule in regard to the use and effect of defining clauses in statutes which are being construed, as enunciated by the Supreme Court of Alabama, and by the courts of other jurisdictions, has been carefully considered, and I am unable to agree with the contentions made by this company.

Section 2 of the Alabama Beverage Control Act reads in pertinent part as follows:

"Section 2. Definitions—The following words or phrases, **unless the context clearly indicates otherwise**, shall have the meaning ascribed to them in this section. * * *

"(k) 'Manufacturer' shall mean any person, association or corporation engaged in the producing, bottling, manufacturing, distilling, rectifying or compounding of liquor, alcohol and malt or brewed beverages in this State." (Emphasis supplied)

It is contended that since the Atlantic Company does not manufacture malt or brewed beverages in **this State**, it is not a "manufacturer" within the sense that term is used in the Alabama Beverage Control Act, even though it is admitted that the Atlantic Company does manufacture malt or brewed beverages in other states.

Provisions of the Alabama Beverage Control Act pertinent to the instant question are Subsection (a) of Section 23, Subsections (5), (6), (7), (8), (9) and the last paragraph of Subsection (10) of Section 25, which read respectively as follows:

"Section 23. (a) Sales by Manufacturers; Minimum Quantities—No manufacturer shall sell any malt or brewed beverages direct to any retailer or for consumption on the premises where sold, nor sell or deliver any such malt or brewed beverages in other than original containers, approved as to capacity by the Board, nor shall any manufacturer maintain or operate within the State any place or places, other than the place or places covered by his or its license where malt or brewed beverages are sold or where orders are taken. Provided, however, that malt or brewed beverages manufactured or brewed in Alabama may be sold direct to the retailer by the manufacturer or brewer."

"Section 25. * * *

"(5) Interlocking Business Prohibited: (1) No manufacturer and no officer or director of any manufacturer shall, at the same time, be a distributor, wholesaler or retail dispenser, or an officer, director or stockholder or creditor of any distributor, wholesaler or retail dispenser, nor except as hereinafter provided, be the owner, proprietor or lessor of any place covered directly or indirectly by any distributor's, wholesaler's malt or brewed beverage liquor license.

"(6) No distributor or wholesaler and no officer or director of any distributor or wholesaler shall at the same time be a manufacturer or retailer, or be an officer, director, stockholder or creditor of a manufacturer or retailer, or be the owner, proprietor or lessor of any place covered by any other vinous and/or malt or brewed beverage or liquor license.

"(7) No licensee licensed under this Act, shall directly or indirectly, own any stock of, or have any financial interest in, any other class of business licensed under this Act.

"(8) Excepting as hereinafter provided, no manufacturer, wholesaler or distributor shall in any wise be interested, either directly or indirectly in the ownership or lease hold of any property, or in any mortgage against the same, for which a liquor or retail dispensers' license is granted; nor shall a manufacturer, wholesaler or distributor, either directly or indirectly, lend any moneys, credit or equivalent thereof to any retailer in equipping, fitting out or maintaining and conducting, either in whole or in part, an establishment or business operated under a liquor retail dispensers' license, excepting only the usual and customary credits allowed for returning packages or containers in which vinous and/or malt or brewed beverages were packed for market by the manufacturer.

"(9) Excepting as hereinafter provided, no manufacturer shall in any wise be interested, either directly or indirectly, in the ownership or leasehold of any property, or any mortgage lien against the same, for which a distributor's or wholesaler's license is granted, nor shall a manufacturer, either directly or indirectly, lend any moneys, credit or their equivalent to any distributor or wholesaler in equipping, fitting out, or maintaining

and conducting, either in whole or in part, an establishment or business where vinous and/or malt or brewed beverages are licensed for sale by a distributor or wholesaler, excepting only the usual credits allowed for the return of packages or containers in which vinous and/or malt or brewed beverages were originally packed for the market by the manufacturer.

"(10) * * * The purpose of this section is to require a separation of the financial and business interest between the various classes of business regulated by this Act, and no person or corporation shall by any device whatsoever directly or indirectly, evade the provisions of this section."

Attention is particularly called to the last paragraph of Subsection (10) of Section 25, *supra*. It is true that if the term "manufacturer", wherever it appears in the above quoted provisions of the act, is read or construed in the light of the definition of that term contained in Section 2, *supra*, then the Atlantic Company would not be a manufacturer within the sense that term is used in the above quoted provisions of the act. It is equally true that if it is so read or construed, the provisions of the Alabama Beverage Control Act, *supra*, prohibiting interlocking business would be virtually nullified or destroyed, and the purpose of Section 25 of the act, *supra*, from which all of the above quoted provisions are taken save one, which is set out in the last paragraph of Subsection (10) of said section, *supra*, would be defeated.

The rule in regard to the use and effect of defining clauses in statutes which are being construed was stated in the following language by Mr. Chief Justice Anderson of the Supreme Court of Alabama in his opinion for the majority in the case of **City National Bank of Decatur v. Nelson**, 218 Ala. 90, 117 So. 681:

"The rule applicable to defining clauses is that they should be used only for the purpose of interpreting words that are ambiguous or equivocal and not so as to disturb the meaning of such that are plain. 36 Cyc. 1106."

See also **Ivey v. Railway Fuel Co.**, 218 Ala. 407, 118 So. 583, and the rule as stated in 36 Cyc. 1105-6 and in 59 C. J. 948.

A statement from the opinion of Blackburn, J. in the case of **Lindsay v. Cundy**, 1 Q. B. D. 348, 358, set out in the note under the statement of the rule in *Corpus Juris* is interesting and informative. He said that the interpretation clause "is a modern innovation and frequently does a great deal of harm, because it gives a non-natural sense to words which are afterwards used in a natural sense, without noticing the distinction."

In my opinion, the term "manufacturer" is used in the above quoted provisions from Sections 23 and 25 of the Alabama Beverage Control Act in its natural sense, and as there used, it is neither ambiguous nor equivocal, but is plain, clear and readily understandable, and, consequently, the definition of the term contained in Section 2 of the act, may not be used. Furthermore, in my opinion, the context clearly indicates that the term "manufacturer", as used in the above quoted provisions from Sections 23 and 25 of the Alabama Beverage Control Act, should not be given the meaning ascribed to it in Section 2, *supra*. In my judgment, the term "manufacturer", as used in the above quoted provisions from Sections 23 and 25 of the Alabama Beverage

Control Act, must be given its natural sense, rather than the meaning ascribed to it in Section 2, *supra*, in order to accomplish the declared purpose and intention of the Legislature as set out in the last paragraph of Subsection (10) of Section 25, *supra*. The fundamental rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute, and a particular rule for construing statutes must be regarded as subservient to the end of determining the legislative intent. See cases collated in 18 Alabama Digest 119, Statutes, Key No. 181 (1).

It is contended that no meaning or effect can be given to the following proviso from Subsection (a) of Section 23, *supra*:

"Provided, however, that malt or brewed beverages manufactured or brewed in Alabama may be sold direct to the retailer by the manufacturer or brewer.";

that this section is in direct conflict with the first sentence of Subsection (c) of said section, which reads as follows:

"(c) Sales by Retailers. No retailer shall purchase or receive any malt or brewed beverages except from regular licensed wholesalers or distributors duly licensed under this Act.";

and that if the quoted excerpt from Subsection (a) of Section 23, *supra*, is given effect, the provisions of the above quoted subsections from Section 25, *supra*, will be emasculated and nullified. However, I am not impressed with these contentions. As I see it, the effect of the above quoted proviso from Subsection (a) of Section 23, *supra*, is to enable a manufacturer of malt or brewed beverages in Alabama to be licensed as a wholesaler or distributor of his product, so that he might sell it direct to the retailer, without the necessity of having someone else sell his product at wholesale or distribute it for him, which could not be done except for this proviso. It is true that this gives one manufacturing malt or brewed beverages in Alabama direct contact with the retail dispensers of such beverages, whereas, under the conclusions herein reached, manufacturers of malt or brewed beverages in other states may not have this direct contact with the retail dispensers of malt or brewed beverages in this State. No doubt, the Legislature felt that the Alabama Alcoholic Beverage Control Board, through the powers of supervision which it has over a manufacturer of malt or brewed beverages in this State, could effectively prevent the evils at which the above quoted provisions of Sections 23 and 25, *supra*, against interlocking businesses, are aimed, even though a manufacturer of malt or brewed beverages in this State is permitted to sell his product direct to the retail dispenser, whereas, it probably did not feel that the Alabama Alcoholic Beverage Control Board could effectively prevent these evils if manufacturers of malt or brewed beverages in other states, over which the Board has no powers of supervision, were permitted to sell their products direct to the retail dispensers.

In any event, I think the above quoted proviso from Subsection (a) of Section 23, *supra*, strongly indicates that the term "manufacturer", as used in the above quoted provisions from Sections 23 and 25, *supra*, is used in its natural sense, and not in the sense given to it by the definition thereof contained in Section 2, *supra*. If the term "manufacturer", as used in the above quoted provisions from Sections 23 and 25, *supra*, is given the meaning ascribed to it in Section 2, *supra*, is contended for by the Atlantic Company, and if the above quoted proviso from Subsection (a) of Section 23, *supra*, is

not given any meaning or effect, as the Atlantic Company contends it should not be given, then we would have the anomalous situation of a manufacturer of malt or brewed beverages outside the State of Alabama being able to sell his products direct to retail dispensers merely by securing a wholesaler's or distributor's license, whereas, a manufacturer of malt or brewed beverages in the State of Alabama could not so sell his products direct to the retail dispensers. Such, in my opinion, was not the legislative intent.

The premises considered, it is my opinion that a manufacturer of malt or brewed beverages outside the State of Alabama may not be legally issued a license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama.

In reaching the above conclusion, I have not overlooked the fact that the Alabama Alcoholic Beverage Control Board, the administrative agency charged with the duty of enforcing the provisions of the Alabama Beverage Control Act, has issued to the Atlantic Company each year since the passage of the Alabama Beverage Control Act a license as a wholesaler or distributor of malt or brewed beverages in the State of Alabama, thus apparently agreeing with the construction of the Alabama Beverage Control Act in regard to this matter now contended for by the Atlantic Company. Nor am I unmindful of the well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. Suffice it to say in this regard, however, that the legal question involved was never called to the attention of the Alabama Alcoholic Beverage Control Board until objections were filed with it against the renewal of the license of the Atlantic Company as a wholesaler or distributor of malt or brewed beverages in the State of Alabama for the year 1940, and that, for the reasons hereinabove given, I am of the opinion that it is clear that such construction is erroneous.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 19, 1940.

Hon. Chris J. Sherlock,
State Highway Director,
Capitol.

State Employee—Liability for Negligence—

Departmental investigation of case in which employee of Department damages State-owned motor equipment is not effective to charge the employee with negligence in the matter and to authorize the State to require reimbursement from the employee for such damages.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of February 15, 1940, which follows:

"Re. Damage to State Automotive Equipment by State Employee.

"Please advise this Department if it has a right to collect for damages to State motor equipment by State employees operating such equipment, if any impartial investigation shows such damages to have resulted from the negligence of an employee operating such piece of State equipment."

Your question does not permit of a definite answer. However, I feel that an application of the following will give you the information desired.

The relationship that exists between an employee of the Highway Department and the State of Alabama is that of master and servant. It is well settled law in this and other states that where the master's property is injured through negligence of the servant, the master may maintain an action at law against the servant, and may recover from the servant damages for such injuries. **Mobile and Montgomery Railway Co. v. Clanton**, 59 Ala. 392; **Woodrow v. Hawving**, 105 Ala. 240, 16 So. 720, 110 A. L. R. 831.

You ask if, in the event an impartial investigation by your department shows such damage to have resulted from the negligence of an employee, this, in and of itself, will authorize the State to collect from such employee damages for injury to such equipment. You are advised that a mere investigation on the part of your department will not, in and of itself, render the employee liable for damages caused to State equipment. Such investigation, as a matter of law, does not establish negligence on the part of the employee. The only way negligence may be established as a matter of law is by proper court action.

What I have said above, of course, does not mean that an employee of his own free will and accord may not voluntarily reimburse the State for any damages caused by his act, whether such damage be the result of his negligence or otherwise. However, your attention is called to Section 9232 of the Code of Alabama, 1923. This section provides that any assignment of wages to be earned in the future is absolutely void. It, therefore, follows that in the event an employee voluntarily offers to reimburse the State for damages caused to State property by his act or omission, no assignment of future wages should be entered into between the State and such employee.

I have carefully examined the Merit System Act and the rules and regulations adopted by the Personnel Board, and I do not find any provision which authorizes a department head to withhold all or any part of the monthly compensation paid to an employee of his department. Act No. 58, S. 44, approved March 2, 1939 (General Acts, 1939, p. 68). As pointed out above, an investigation by your department will not establish liability for the damage caused to State property by such employee.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 19, 1940.

Hon. T. Weller Smith, Director,
Department of Public Safety,
Montgomery, Alabama.

School Busses—A person, who owns and operates a school bus under contract with a county board of education, may transport normal school students and teachers to and from school and charge a fee therefor, provided he first obtains authority from the County Superintendent of Education to transport such students and teachers; such a person does not come within the purview of the Motor Vehicle Act of 1932, and is not required to procure any tag other than the regular school bus tag issued to him.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of February 26, 1940, in which you request my opinion as follows:

"Attached herewith is a letter from the Superintendent of Education of Sumter County which is self-explanatory. I referred this letter to Mr. Black of the Public Service Commission and he suggested that I make inquiry of you as to your opinion regarding the question of hauling these students to the State Teachers College.

"The pertinent part of the letter from the Superintendent of Education is as follows:

"School bus contractors bringing high school and elementary school children to Livingston have also been transporting college students to the Livingston State Teachers College. The County Board of Education has no objection to such transportation so long as the elementary and high school children are taken care of and so long as the buses are not overcrowded.

"The question for which the bus contractors want the answer is: It is permissible for the school bus contractor, using a school bus tag, to charge college students a small monthly fee for such transportation?"

"In my opinion this man cannot haul anyone for hire unless he has a bus tag and makes only an occasional haul. If he is hauling passengers for hire every day it seems he would come under a common carrier over a fixed route. However, it is respectfully requested that we be given the benefit of your advice."

In my opinion, a person operating an individually owned school bus who, in addition to transporting high school and grade school teachers and students from their respective homes to their respective schools and return under contract with a county board of education having jurisdiction of said schools legally may transport, with the approval of the county superintendent of

education, normal school teachers and students along his route from their respective homes to said normal school and return and charge a fee therefor, without thereby becoming liable for the payment of license or tag tax upon the motor vehicle in which said students are transported, and without becoming a common carrier or a contract carrier under the provisions of the Motor Vehicle Act of 1932, as amended.

Said 1932 Act required the licensing of a contract carrier or common carrier, under the supervision of the Alabama Public Service Commission, and the payment of fees to, and filing of bond in the office of, the Probate Judge of the county of the residence of the owner of the vehicle. It further provided for the imposition of mileage tax and other fees upon such common carriers and contract carriers.

By Section 2 thereof, there were excepted from the provisions of the Act "motor vehicles for hire while being used exclusively for the transportation of school children and school teachers to and from school."

This office had occasion to render opinions upon this exemption provision. See Biennial Report, Attorney General, 1932-34, page 464; Opinion to the President of the Alabama Highway Commission, dated April 29, 1935, Vol. 3-A, Opinions of Attorney General, Office Edition, page 233; Opinion to Superintendent of Education, Tuscaloosa County, dated August 11, 1935, Vol. 6-A, Opinions of Attorney General, Office Edition, page 9.

The 1935 Legislature broadened the exemption of school busses dealt with in the 1932 Act, supra, by the enactment of Sections 2 and 3 of Act No. 547, H. 948, approved September 14, 1935 (General Acts, 1935, page 1167). These sections provide, in pertinent part, as follows:

"Section 2. There shall be excepted from the provisions of this Act:
1. Motor vehicles while being used exclusively for the transportation of school children and school teachers to and from school, **or while being used for any school purpose or any public or community purpose at the direction of or by authority of the superintendent of education having supervision over the school or schools regularly served by such motor vehicle**, and such motor vehicles, while being so used, shall be exempt from any license tax or registration fee required of a contract carrier, a common carrier, or a jitney bus. * * *

"Section 3. The State of Alabama shall provide at state expense a special license tag to be used on and to designate all motor vehicles used exclusively for the transportation of school children and school teachers to and from school, **or while being used for any school purpose or any public or community purpose at the direction of or by authority of the Superintendent of Education having supervision over the school or schools regularly served by such motor vehicles**. These tags shall be supplied annually upon requisition to the State Comptroller by the State Superintendent of Education, this requisition to be based upon applications for such license tags made by county and city superintendents of education and approved by county and city boards of education, the application made by each superintendent to give the name and address of the operator of the motor vehicle on which the license tag is to be placed and to contain a certification that said motor vehicle will be used for the purposes designated in this act." (Emphasis supplied)

On October 9, 1935, subsequent to the enactment of the above quoted amendments, this office rendered an opinion to the Probate Judge of Bibb County construing the same. See Opinions of the Attorney General, Vol. 7-A, Office Edition, page 45.

I understand from the facts submitted by you in your inquiry that "the County Board of Education has no objection to the transportation of normal school students and teachers, and charging a fee therefor by the bus operator, so long as the elementary and high school children and teachers are adequately taken care of, and so long as the busses are not overcrowded." I construe this to mean that the Superintendent of Education of Sumter County has authorized the transportation of the normal school students and teachers and the charging of a fee therefor. If I am correct in my assumption as to the authorization by the County Superintendent of Education, it is my opinion that the transportation of the normal school students and teachers is such a school purpose or public or community purpose" as is contemplated by the quoted sections of the 1935 Act, *supra*.

Of course, if the County Superintendent of Education declines or refuses to authorize the school bus operator to transport normal school students and teachers and charge a fee therefor, in connection with his transportation of grade school and high school students and teachers, there would be no authority for such bus operator to transport such normal school students and teachers and charge a fee therefor; and, under such circumstances, he would be required to procure a bus tag and would come under the 1932 Motor Vehicle Act, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 19, 1940.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Board of Equalization—Inventory and appraisal of property—Department of Revenue—

Under the provisions of Act No. 400, H. 868, approved September 15, 1939, General Acts 1939, page 524, Commissioner of Revenue authorized, upon the approval of the Governor, to pay the State's pro rata share of expenses of inventory and appraisal of taxable property in counties having a population of 200,000 or more, when such inventory and appraisal ordered and directed by the County Board of Equalization.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of March 8, 1940, has been received. Your letter follows:

"Your opinion is requested upon the following subject. House Bill 868, Act No. 400, approved September 15, 1939, authorizes the county Boards of Equalization in counties having population of 200,000 or more to provide for the inventory and appraisal of taxable property in such counties and provides among other things that,

"When the Board of Equalization or like boards or agencies, with final authority to fix the value of property for the purposes of taxation of any such county shall provide for the taking of any such inventory and appraisal, the Commissioner of Revenue of the State, subject to the approval of the Governor, shall have the authority to pay the State's pro rata thereof, * *."

"Section 3 of said act is as follows:

"The cost and expenses of any inventory taken under the provisions of this act shall be paid monthly on the first day of each month as the inventory is being taken, and the State and all other governmental subdivisions and agencies contributing to the payment of the cost and expenses of the same shall be required to pay their pro rata portion of such cost and expenses into the county treasury monthly upon requisition by the presiding officer of the county commission or other like governing body, accompanied by an itemized statement showing the amount due by the particular governmental unit, subdivision or agency. The Commissioner of Revenue of the State shall have authority, subject to the approval of the Governor, to draw his warrant monthly on the State Treasurer of any such county, in payment of the State's pro rata of the cost and expenses of any inventory or appraisal and there is hereby appropriated such amount necessary for the payment of said expense out of the General Fund of the State not otherwise appropriated."

"Jefferson County has been going forward with the inventory and appraisal of property in that county for a period of several months and the county with the assistance of other political subdivisions has been bearing the expense thereof.

"Just recently the Governor has been advised by the Director of the Department of Finance that funds are available for the current fiscal year to pay the State's part of the above-mentioned expenses in an amount not to exceed \$10,000.

"The question arises as to whether or not I as Commissioner of Revenue have the authority, subject to the approval of the Governor, to draw a warrant or warrants to pay any part of the expenses which have been incurred prior to the date of the approval of the expenditure by the Governor. In other words, there has been a period where the county has borne the expense and the State did not join in by paying its pro rata share for it was not known whether funds would be available during this current year for that purpose. The county governing body is now requesting that I draw a warrant on the State Comptroller to pay the State's pro rata share of the expenses incurred since the date of the approval of the act or a sufficient amount thereof to absorb the available appropriation. Please advise as to your opinion in the matter."

It is my opinion that under the facts stated above, you, as Commissioner of Revenue, with the approval of the Governor, are authorized to draw your

warrant on the State Treasury to pay the State's pro rata share of the expenses of the inventory and appraisal of the taxable real property of Jefferson County.

Section 2 of Act No. 400, H. 868, approved September 15, 1939, General Acts 1939, page 524, reads as follows:

"Section 2. That the county commission, or other like governing body of all such counties shall have the power and authority to provide for the payment of the cost and expenses of such inventories, and to pro rate such cost and expenses between the County, the State, each municipality, the County Board of Education, and each City Board of Education in the County, such proration to be approximately in the proportion that the revenue received by the State, the County, such municipalities and such boards of education, respectively, bears to the total amount of ad valorem taxes collected in the county. When the Board of Equalization or like boards or agencies, with final authority to fix the value of property for the purposes of taxation of any such county shall provide for the taking of any such inventory and appraisal, the Commissioner of Revenue of the State, subject to the approval of the Governor, shall have the authority to pay the State's pro rata thereof, and each municipality and each board of education in such county shall have authority to pay its pro rata of said cost and expenses, and the county governing body shall have authority to provide for the payment of the County's pro rata thereof; provided, however, that the failure of either the State or any of said municipalities or boards of education to provide for the payment of their pro rata portion of said cost and expenses shall not prevent the county, or any of the other governmental bodies or agencies mentioned herein continuing such inventory and appraisal and paying the entire cost thereof, upon such terms as may be agreed upon between the county and such governmental bodies or agencies."

It will be noted from the above quoted section that when the Board of Equalization or other agencies, with final authority to fix the value of property for taxation purposes of any county having a population of 200,000 or more, authorize the taking of an inventory or appraisal, the Commissioner of Revenue, with the approval of the Governor, shall have the authority to pay the State's pro rata share of the expenses of such inventory and appraisal.

It is true that Section 3 of Act No. 400, *supra*, provides for a method of paying the State's pro rata share of these expenses, this method of paying being on a monthly basis. However, I do not believe it was the intention of the Legislature to make this method of payment exclusive—this for the reason that at the time of the passage of this Act, it was not known whether there would be any funds available in the General Fund of the State's pro rata share of these expenses. It is a well known rule of statutory construction that statutes should be construed according to the manifest purpose and intention of the lawmakers, and such purpose should not be defeated by a narrow construction based upon a nice distinction in meaning of words. **Thomason v. Court of County Commissioners**, 184 Ala. 28, 63 So. 87.

It is, therefore, my opinion that it was the manifest purpose of the Act under consideration that the State pay its pro rata share of the expenses of the inventory and appraisal of the taxable real property in counties having a population of 200,000 or more, when such inventory or appraisal was ordered by and made under the direction of the County Board of Equalization.

You are advised that, in my opinion, you, as Commissioner of Revenue, with the approval of the Governor, are authorized to draw your warrant on the State Treasurer against the funds now available to pay these expenses and to reimburse Jefferson County for the State's pro rata share thereof, which have heretofore been paid by said county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1940.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Counties—Schools—

Board of revenue, court of county commissioners, or other like governing body, has no authority to make an appropriation or contribute to an individual for the purpose of carrying on education work in the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 16, 1940, in which you request my opinion as follows:

"Please give us an opinion on whether or not the Board of Revenue or Commissioners' Court can make an appropriation or contribute to an individual for the purpose of carrying on educational work in their county."

I am of the opinion that your inquiry should be answered in the negative. The authority of a county governing body to appropriate funds for the support of public schools within a county is found in Act No. 602, H. 751, approved August 4, 1931 (General Acts, 1931, page 687). Section 1 of said act provides as follows:

"Section 1. The Courts of County Commissioners or Boards of Revenue of the several Counties of Alabama are hereby authorized at any meeting of said Court in any Calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the County Treasury for the support of the Public Schools within said county."

It will be noted from the above quoted section that the appropriation in question must be for the support of the public schools within the county. See Biennial Report of Attorney General, 1934-36, page 616; Opinion of the Attorney General to Member, House of Representatives, Hale County, on March 7, 1940 (copy enclosed).

Although the matter of your inquiry may deal with an appropriation for school purposes by the county governing body, yet it is not, in my judgment, an appropriation for the support of the public schools within the county within the contemplation of the 1931 Act, *supra*. See Quarterly Report of Attorney General, Vol. XII, page 144.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 20, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Counties—Court Houses—County Commissioners—

1. County governing body has authority to rent rooms in court house to private individuals when such rooms are not needed for county purposes.
2. Counties have no authority to rent rooms in court house to individuals, and rent offices for county purposes outside the court house.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 12, 1940, in which you request my opinion as follows:

"Please give me your answer to the following questions:

"1. Has the governing body of a County authority to rent out a room or rooms in the Courthouse to private individuals?

"2. If your answer to the above question is in the affirmative, would this also be the case if the governing body, due to having rented Court-house space to private individuals, had to rent outside space for official County purposes?"

In reply, I wish to advise that, in my opinion, the answer to your first question, subject to certain limitations hereafter set out, should be answered affirmatively.

I wish to refer you to Section 6755 of the Code of Alabama, 1923, as amended, which provides in part as follows:

"Section 6755. Authority of court.—The court has authority—1. To direct and control the property of the county as it may deem expedient according to law, and in this direction and control it has the sole power to locate the courts in the rooms of the courthouse and to designate the rooms to be occupied by the officers entitled to rooms therein, including the circuit judge, if resident in the county, and to change the location of the courts, and the designation of the rooms for officers, as it may deem best and most expedient, and this shall be done by order of the court entered upon the minutes of the court at a regular term of court. In the event the courthouse is inadequate to supply office rooms for such officers, the court may lease such office rooms in a convenient location in the county site and pay the rental from the county fund. * * *"

I also wish to refer you to Section 209 of the Code of Alabama, 1923, which is as follows:

"209. Commissioners have custody of property, and may sell.—The court of county commissioners have control of all property belonging to the county, and may, by an order to be entered on its minutes, direct the disposal of any real property, which can be lawfully disposed of, and direct the probate judge to make titles thereto; and a conveyance made by the probate judge in accordance with such order invests the grantee with the title of the county."

In the case of **Corning v. Patton**, 236 Ala. 354, 182 So. 39, the Supreme Court of Alabama stated:

"We may add that it would be an anomaly to hold that when the lawmakers gave the commission the general control of county property that they could not rent or lease it when a sale of same was not advisable and it was no longer needed or used for county purposes."

The premises considered, it is my opinion that when the rooms in the court house are not needed for county purposes, the county governing body has full authority to rent such rooms to private individuals.

The reply to your second question must, upon the same authority cited in answer to your first question, be answered in the negative. It is evident that when the space in the court house is needed for county purposes, no authority to continue renting such space to individuals exists. **Jackson v. Ball**, 211 Ala. 273, 100 So. 327.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 20, 1940.

Hon. C. E. Carmichael,
Judge of Probate,
Colbert County,
Tusculumbia, Alabama.

Court of County Commissioners—

1. May furnish office of Farm Security Administration with telephone, whether office is located in courthouse or not.
2. May furnish office of Farm Security Administration with telephone to be paid from Sales Tax receipts if approved by proper State or Federal agency, whether said office is located in courthouse or not.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of February 26, 1940, in which you request my opinion as follows:

"Please give me a ruling upon the following question. Can the County provide a telephone for the local office in this County of the Farm Security Administration and pay for the phone out of the County Treasury?"

The court of county commissioners, or other like governing body of the county, has the authority to designate which offices in the courthouse shall be furnished telephones at the expense of the county (Act No. 187, S. 199, approved April 19, 1933, General Acts of 1933, page 201). See the numerous opinions cited in our opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, under date of November 9, 1939, Quarterly Report of Attorney General, Vol. XVII, page 381.

Therefore, if the office of the Farm Security Administration is located in the courthouse, the court of county commissioners, or other like governing body of the county, may designate this office as one to be furnished with a telephone at the expense of the county.

However, if the office of the Farm Security Administration is located outside the courthouse, we must look elsewhere for authority to pay for telephone in the office so located. This office has held in an opinion to Hon. Grady R. Williams, Judge of Probate, Lauderdale County, under date of December 22, 1939, Quarterly Report of Attorney General, Vol. XVII, page 399, that the county may pay, from the general fund, a part of the administrative expenses of the offices of the Farm Security Administration (see the numerous opinions cited therein). It is my judgment, under the Farm Security Administration, located either in or outside the courthouse, would certainly come within the purview of "administrative expenses." Also see the opinion to Hon. John S. Golson, Judge of Probate, Butler County, under date of November 15, 1937, Quarterly Report of Attorney General, Vol. IX, page 93.

Furthermore, it is my opinion that the payment for telephone service in an office of the Farm Security Administration, located either in or outside the courthouse, can properly and legally be made from the proceeds of the Sales Tax under the restrictions discussed at length in an opinion to Hon. J. R. Copeland, Judge of Probate, Blount County, under date of June 30, 1939, Quarterly Report of Attorney General, Vol. XV, page 343.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 20, 1940.

Hon. Harry D. Raymon, Judge,
Inferior Court of Macon County,
Tuskegee, Alabama.

Physicians and Surgeons—

A duly licensed physician under Section 2839 of the Code of 1923 is eligible for membership in the Alabama Medical Association and also County Medical Society, and, therefore, a holder of a certificate issued under Act No. 544, H. 769, approved September 14, 1935 (General Acts, 1935, p. 1157), as amended by Act No. 169, S. 89, approved April 21, 1936 (General Acts, 1936, p. 199), may select such physician to treat him while a patient in the hospital.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of March 12, 1940, in which you request my opinion as follows:

“Act No. 544, House 769, which was approved September 14, 1935, provides for a non-profit corporation for hospital service. One provision of the act reads as follows: ‘It (the certificate) shall also provide that any doctor may be selected by the certificate holder to treat while a patient is in the hospital provided the doctor selected is a reputable doctor and eligible for membership in his County Medical Society.’

“I will appreciate your giving me an opinion on the following questions pertaining to the above quotation from the act : 1. Is it necessary for the physician to be a member of his County Medical Society in order for a certificate holder to select him as his physician? 2. Is it sufficient under the act for a physician to be a duly licensed practitioner under the laws and the regulations of the State of Alabama and for said physician to have met all educational requirements, but who does not belong to a County Medical Society but is eligible for membership?”

Your attention is called to Section 5 of Act No. 544, H. 769, approved September 14, 1935 (General Acts, 1935, p. 1157), as amended by Act No. 169, S. 89, approved April 21, 1936 (General Acts of Alabama, Extra Session, 1936, p. 199), which reads as follows:

"Section 5. Every corporation organized under the provisions of this Act shall procure from the Superintendent of Insurance a certificate of authority to do business for which the corporation shall pay the sum of Two Hundred Dollars (\$200.00), and such certificates of authority shall be renewed thereafter on or before the first day of March of each year. The corporation may then enter into contracts with the public, subject to the restrictions herein contained, for the rendering of hospital service. It shall be the duty of such corporation to issue certificates to those of the public who shall desire to avail themselves of the hospital service plan herein provided for, which certificates shall specify the hospital service which is proposed to be rendered, and such certificates may provide for more than one class of service, and such certificate shall state the retail value of all items or classes of service agreed to be furnished. Such certificates must also specify the charge or premium which is required to be paid for the services therein called for. Each certificate shall carry a service date covering the full period of time paid for, and shall designate the person or persons, or class of persons, who shall be entitled to hospital service under said certificate and shall also designate the hospitals which are to render the services provided for in said certificate. Said certificate shall stipulate that the service therein provided shall not include any medical or surgical services. **It shall also provide that any doctor may be selected by the certificate holder to treat him while a patient in the hospital and eligible for membership in his County Medical Society.** No such corporation shall issue or sell any contract until the same shall have been approved in writing by the Superintendent of Insurance." (Emphasis supplied)

Section 2839 of the Code of Alabama, 1923, provides:

"Section 2839. Certificate to practice medicine.—When an applicant who has undergone examination shows such a standard of proficiency in the branches of medical learning enumerated in section 2837 (1627) of this Code as has been or may be fixed by the medical association of the State of Alabama, a certificate of qualification, in form to be prescribed by the said association, shall be issued to the applicant, which certificate shall entitle the holder thereof to treat any diseases of human beings he may be called upon to treat in accordance with the teachings of the school or sect of medicine to which he belongs."

The State Health Officer advises me that, under Section 2 of Article 15 of the Constitution of the State Medical Association, a physician duly licensed under Section 2839 is eligible for membership in the State Medical Association and a County Medical Society. It does not follow that one who is eligible to membership in either the State Medical Association, or a County Medical Society must be a member of such Association or Society.

The premises considered, I am of the opinion that:

1. It is not necessary for a duly licensed physician to be a member of his County Medical Society in order for a holder of a certificate, issued pur-

suant to Act No. 544, as amended, supra, to select such physician to treat him while a patient in the hospital.

2. It is sufficient, under the provisions of Section 5 of Act No. 544, as amended, supra, for a physician to be duly licensed to practice medicine under the provisions of Section 2839 of the Code of Alabama, 1923, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 20, 1940.

Hon. George E. Stone,
Treasurer, Mobile County,
Mobile, Alabama.

There is no official map of the State of Alabama.

County governing body not authorized to expend county funds for purchase of map of Alabama unless purchased for use of county in connection with construction of roads and bridges.

Opinion by the Attorney General.

Dear Sir:

I have your letter of February 28, 1940, in which you request my opinion as follows:

"I have a claim before me payable to D. A. Hollowell for two official maps of Alabama, at \$4.90 each.

"1. Is there an official map of Alabama?

"2. Can the County pay for these maps?"

You first inquire as to whether or not there is an official map of Alabama. I do not know of the Legislature of this state having adopted as official any particular map of the State of Alabama. The records in the office of the Secretary of State do not show that any such action has been taken by the Legislature.

In your second inquiry, you ask whether or not the county can pay for a so-called official map. I am not aware of any statutory provision which authorizes the county governing body of any county operating under the general laws of the State to make a purchase, nor am I familiar with any

local act or general act with local application affecting Mobile County, which authorizes such an expenditure of county funds.

Governing bodies of the several counties have more or less legislative powers in connection with the construction of roads and bridges in their respective counties, and if a map is of such a nature as to be of particular benefit to the governing body of Mobile County in the construction of the roads and bridges of the county, then appropriate county funds may be expended for its purchase, even though the map was of the entire state. The purpose for which the map was purchased would have a distinct bearing on the question as to whether or not such county funds could be expended for that purpose. Your letter is silent as to the officer or department of county government for which the map was purchased.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 20, 1940.

Hon. Harry L. Lazenby,
Tax Assessor, Monroe County,
Monroeville, Alabama.

Silk yarn used in the manufacture of silk garments is not exempt from ad valorem taxation, under provisions of Subdivision 1 of Section 2 of General Revenue Act of 1935 (General Acts, 1935, page 256), as amended by Act No. 84, S. 43, approved February 9, 1937 (Acts 1936-37, page 95).

Opinion by the Attorney General.

Dear Sir:

This is to acknowledge receipt of your letter of recent date, which is as follows:

"A silk manufacturing plant located here in 1937, and is engaged in the manufacture of ladies underwear.

"This plant purchases the yarn, that is the thread, and weaves the cloth and completes and packs the garments ready for shelves of the retail merchants.

"They also purchase the necessary elastic, tape and other trimming materials that go into the completed garments, but the yarn is the base material used.

"Naturally this factory has a lot of this yarn and other enumerated materials on hand always.

"In making their ad valorem tax returns they have claimed the value of this yarn and other material used in their manufacturing process on hand as of October 1st exempt from ad valorem tax under the provisions of sub-division 1, Section 2, General Revenue Act of 1935, General Acts, 1935, page 256. Their contention is that these items are raw materials so far as their operations are concerned.

"Please advise me if the value of the above enumerated items is exempt to this manufacturer from ad valorem taxes.

"I charged tax on this item 1938 and they paid same. Also charged them in 1939, but they claim it is exempt and don't want to pay."

The answer to your inquiry depends upon the construction to be placed upon Subdivision 1 of Section 2 of the General Revenue Act of 1935, approved July 10, 1935 (General Acts, 1935, page 256), as amended by Act No. 84, S. 43, approved February 9, 1937 (Acts of 1936-37, page 95), which is as follows:

"The following property and persons shall be exempt from ad valorem taxation and none other: * * * (1) All raw material, including coke, produced during the current calendar year, when stocked at any plant or furnace, for manufacturing purposes in Alabama."

Your inquiry presents a very difficult problem and the conclusion which is hereafter reached is not free from doubt.

The question is whether or not the term "raw material" as used in the exempting statute includes only crude materials (other than coke), or does it include products made from crude material which have undergone manufacturing processes and have been converted into distinct products from which an entirely different product may be made by the application of additional scientific processes. Most of the decisions of the courts of other states are committed to the view that the words "raw material" as used in the various statutes of those states are not limited to simply crude material. **Louisville v. Louisville Tin and Stove Co.**, 110 Ky. 557, 186 S. W. 124; **Planters Fertilizer & Chemical Co. v. Board of Assessors**, 116 La. 667, 40 So. 1035; **City of Henderson v. George Delker Co.**, 235 S. W. 732.

I have been unable to find any decisions of the appellate courts of this state which bear directly on the question at hand. In view, however, of the long administrative construction which has been placed on the statutory provision in question, I am constrained to the conclusion that the words "raw material" as used in said section are limited to crude materials, with the exception of coke. This office has heretofore ruled to this effect in an opinion rendered to Hon. Roy Johnson, Tax Assessor, Jefferson County, under date of July 12, 1938, Quarterly Report of Attorney General, Vol. XII, page 44.

I find that as far back as 1927 a like construction was placed on the exempting statute by the then State Tax Commission. For your information, I am hereafter setting out the finding of the State Tax Commission:

"STATE OF ALABAMA
THE STATE TAX COMMISSION
MONTGOMERY
February 9, 1927.

"To TAX ASSESSORS:

SUBJECT: Exemption from Taxation of Raw Material. Revenue Code 1923, Section 2, Subdivision 11.

"STATEMENT OF QUESTION TO BE DECIDED

"A firm operating a planing mill purchases rough lumber from a saw mill. Thus rough lumber is the material upon which the planing mill begins its manufacturing processes. The lumber is shipped from the saw mill and is stored on the yards and is owned by the planing mill. The lumber was manufactured during the current calendar year. If the lumber in the form in which it comes from the saw mill is a manufactured product, its exemption as such manufactured product ceased when it left the yards of the saw mill. The claim is made by the planing mill that this rough lumber is to the planing mill raw material and should be classed as such under the intent to exempt raw material, as provided in Section 2, Subdivision 11, Revenue Acts 1923. The question to be decided is whether an article, itself a manufactured product, can be reconverted to the status of raw material in the hands of the manufacturer who began his manufacturing processes with this article in the form in which it was purchased.

"RULING

"There is no doubt that rough lumber is a manufactured product and as a manufactured product would be exempt for a period of twelve months, so long as it remains in the hands of the manufacturer. When it passes from the hands of the manufacturer, it loses its exemption as a manufactured product and, in the judgment of the Commission, having been at one time exempt as a manufactured product, it can never again become entitled to exemption as raw material, no matter by whom or under what conditions owned. We think this would apply to all manufactured products, except coke, which is expressly exempt as raw material in the language of Subdivision 11, Section 2, Code of 1923.

Very truly yours,

STATE TAX COMMISSION,

By /s/ L. H. Brassell,

Associate Member."

The 1923 statutory provision construed in the Tax Commission ruling above set out is identical with the present statute in all respects material to the present inquiry. *State v. H. M. Hobbie Grocery Co*, 225 Ala. 151, 142 So. 46; *Alabama Public Service Commission v. Jones*, 236 Ala. 370, 182 So. 452.

It is, therefore, my opinion that the silk yarn referred to in your letter of inquiry is not exempt from ad valorem taxation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 20, 1940.

Hon. Irby Pope,
Judge of Probate,
Perry County,
Marion, Alabama.

Perry County—Primary Elections—Commissioners' Court—

Qualified elector of one commissioner's district not legally qualified as candidate for nomination for office of county commissioner from another district in forthcoming Democratic Primary Election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 14, 1940, in which you request my opinion as follows:

"Please advise if a candidate for County Commissioner of Perry County, Alabama, who resides in Uniontown District is eligible for election as County Commissioner from the Marion District in Perry County, Alabama, bearing in mind that the whole County of Perry votes for the Commissioner.

"Also, please advise whether or not a candidate living in Uniontown District in this County can move into another District within less than three months before a Primary Election, and be legally elected and hold office as County Commissioner from the District to which he moves.

"Your attention is called to Local Acts 1894-95, Page 553, and also to the resolution of the Court of County Commissioners of Perry County, Alabama, on the 12th day of February 1896, a copy of which is hereto attached.

"Please give us an opinion on this matter at the earliest possible moment as it involves the primary of May 7th."

I assume that your questions are addressed to the eligibility of the person described in your letter of inquiry as a candidate for nomination for the office of county commissioner from the Marion District in the forthcoming Democratic Primary Election, and further that by your statement that the person resides in the Uniontown District, you mean he is a qualified elector of that district.

Replying to your first inquiry, you are advised that a qualified elector of the Uniontown District of Perry County is not eligible as a candidate for nomination for the office of county commissioner from the Marion District in the forthcoming Democratic Primary Election.

The Local Act of 1894-95, to which you refer in your request, specifically provides in Section 6 that:

"No person shall be eligible for election as commissioner unless he is at the time he offers for election a qualified elector of the district in which he offers for election." Act No. 313, H. 243, approved February 13, 1895 (Acts of Alabama, 1894-95, p. 553)

The adoption of the Code of 1907 did not have the effect of repealing this local act because local laws are expressly saved by Section 10 of that code. **Brandon v. Askew**, 172 Ala. 160, 54 So. 605. Nor was such act repealed by the adoption of the 1923 Code for the reason that it was expressly saved by Section 11. **City of Birmingham v. Jones**, 228 Ala. 160, 153 So. 213; **Speer v. State**, 235 Ala. 46, 177 So. 167. See also other cases collated in 18 Alabama Digest, Statutes, Key No. 167(2).

I have carefully examined the local laws enacted relating to Perry County since the Act of 1894-95, and I do not find that there have been subsequent enactments changing the effect of such statute.

I assume, of course, in answering your inquiries that the resolution which you enclosed, which establishes the commissioners' districts in Perry County has not been amended, altered or repealed, in respects here material.

Section 9 of the 1931 Primary Act, which is Act No. 56, H. 73, approved February 25, 1931 (General Acts, 1931, p. 73), provides:

"Section 9. The name of no candidate shall be printed upon any official ballot used at any primary election unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary election in which he seeks to be a candidate and possesses the political qualifications prescribed by the governing body of his political party." (Emphasis supplied)

In accordance with the provisions of the above quoted section of the 1931 Primary Act, and pursuant to the authority vested in it by Section 12 of said act, the State Democratic Executive Committee of Alabama, by resolution dated January 8, 1940, fixed the qualifications for candidates for nomination or election in the forthcoming Democratic Primary Election, and provided for the declaration of candidacy to be filed by such candidates, in the following manner:

"6. That the following persons, and none others, shall be eligible to be candidates for nomination or election in said Primary Elections, namely: Qualified white electors who possess the qualifications fixed by law for the respective offices for which they are candidates for nomination or election; * * *"

"7. That candidates for nomination or for election for all of said offices shall, on or before March 1st, 1940, file with the Chairman of the State Democratic Executive Committee in all offices except county offices, and in the county offices with the Chairman of the respective County Democratic Executive Committees, a declaration of candidacy substantially as follows:

"I hereby declare myself to be a candidate for the Democratic nomination (or election) in the Primary Elections to be held on Tuesday

the 7th day of May, 1940, and on Tuesday the 4th day of June, 1940, for the office of _____. I hereby certify that I did not vote, in the general election held in November, 1938, a Republican ticket or any independent ticket, or the ticket of any party or group, other than the Democratic Party, or for anyone other than the nominees of the Democratic Party, or any ticket other than the Democratic ticket, or openly and publicly in said election oppose the election of the nominees of the Democratic Party or any of them. I further agree to abide by the result of the Primary Elections in which I am a candidate and to support the Democratic nominees in said election. I further certify that I am a qualified white elector of the State of Alabama, and **possess the qualifications fixed by law for the office for which I am a candidate.**

“Sworn to and subscribed before me on this the _____ day of _____, 1940.

Notary Public.” (Emphasis supplied)

The State Democratic Executive Committee had the authority to fix the qualifications and to provide for the declaration of candidacy hereinabove set out. **Lett v. Dennis**, 221 Ala. 432, 129 So. 33.

Thus, it can be seen that the person described in your letter of inquiry did not, at the time by which he must have filed his declaration of candidacy, which was on or before March 1, 1940, possess the qualifications prescribed by Section 6 of the local act, supra, for the office of county commissioner from the Marion District, since he was at the time a qualified elector of the Uniontown District, and, consequently, did not possess the qualifications prescribed in the resolution, supra, for a candidate for nomination for the office of county commissioner from the Marion District in the forthcoming Democratic Primary. The fact that he might, by moving his residence, later acquire the qualifications necessary for the office of county commissioner from the Marion District, would be immaterial to the question of whether or not he is eligible as a candidate for nomination for the office of county commissioner from the Marion District in the forthcoming Democratic Primary Election. Cf. **The State ex rel Ingliss v. Nicholson**, 66 Ala. 180.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 20, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Capitol.

1. Construction of Section 43 of Act No. 81, H. 31, approved March 4, 1931 (General Acts, 1931, page 154) as amended.

2. Licenses—License or privilege tax imposed by Section 43, supra, due and payable on October 1 of each year.

3. Licenses—Full amount of license or privilege tax levied by Section 43, supra, due and payable each year.

4. Funds—When funds in State Pilotage Commission's treasury exceed \$2,000, such excess immediately should be paid over to State Treasury.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for an official opinion dated March 12, 1940, as follows:

"Please refer to Section 43, General Act No. 81, House Bill 31, 1931 Regular Session, as amended by Act No. 9, Senate Bill 23, approved January 24, 1935, General Acts 1935, page 11, and advise me as follows:

"1. Is it not the intent of the law that this license or privilege tax be paid at the beginning of the fiscal year?

"2. If the Board, by proper resolution, permits the tax to be paid quarterly, is it the intent of the law that these quarterly payments should be arranged and made in such a way as to cause the entire \$25.00 to be paid during the fiscal year for which the license is issued?

"3. Does the law intend that, if at any time during the fiscal year the funds in the State Pilotage Commission Treasury exceed \$2,000.00, such excess should immediately be paid over at the end of the fiscal year, after all operating expenses for that particular year have been defrayed.

"4. If your answer to question number one is in the affirmative, what would the situation be if the Pilotage Commission allowed a number of pilots to operate during any fiscal year without paying the license or privilege tax, when, if they had been required to pay same, it would have created a surplus in the Commission's Treasury in excess of \$2,000.00?"

You first ask whether or not the license or privilege tax provided for in Section 43 of Act No. 81, H. 31, approved March 4, 1931 (General Acts of 1931, page 154), as amended by Act No. 9, S. 23, approved January 24, 1935 (General Acts, 1935, page 11), is due and payable at the beginning of each fiscal year. Said section, as amended, is as follows:

"Section 43. There is hereby levied upon each licensed pilot engaged in service as such under the provisions of this Act a license or privilege tax in the sum of twenty-five dollars (\$25.00) annually, to be paid to the Secretary of the Board, and to be used for defraying all expenses and expenditures of said Board accruing under the provisions of this Act. The Board may, by proper resolutions, permit said tax to be paid quarterly. Whenever the funds in the Treasury of the Board exceed the sum

of two thousand dollars (\$2000.00) such excess shall be paid over to the Treasury of the State of Alabama. Such privilege or license taxes so paid to the Secretary of said Board shall become a part of the funds of said Board and shall be deposited by the Secretary and otherwise handled and disbursed, as required by the provisions of this Act."

It will be noted that the above section makes provision for the payment of an annual license or privilege tax but is silent as to when the said tax becomes due and payable. It, therefore, becomes necessary, in order to answer your inquiry, to resort to the general rules of statutory construction in this regard. The date that said license or privilege tax became due and payable was clearly expressed in Section 43 of the original act before its amendment. Said section originally contained the following provision:

"Only such proportion of said tax shall be paid before October 1st, 1931, as the time intervening the date this act goes into effect and October 1, 1931, bears to one year."

The above provision was omitted from the 1935 amendment to Section 43, supra, because there was no longer a need for the same. However, in my opinion, said provision clearly shows that it was the intention of the legislature that the annual license or privilege tax should continue to become due and payable on October 1 of each year, as was provided when the said tax was originally imposed.

Therefore, I answer your first inquiry in the affirmative, that is, the license or privilege tax imposed by Section 43, supra, is due as of the beginning of each fiscal year which commences on the first day of October and ends on the thirtieth day of September, (Section 26 of Budget and Financial Control Act, Act No. 37, S. 87, approved September 27, 1932, General Acts, 1932, page 35). However, this is subject to installment payments as discussed below.

It is my opinion that your second inquiry should be answered in the affirmative.

Section 43, supra, specifically provides that the license or privilege tax in the sum of twenty-five dollars (\$25.00) is levied annually against each licensed pilot. The word "annually" has been construed to mean year by year, or once a year. *McMaster v. New York Life Ins. Co.*, (U. S.) 99 Fed. 40, 40 C. C. A. 119; *Hoffaun Specialty Co. v. Pelouze*, (Virginia) 164 S. E. 397, 399. The fact that the Board is authorized to permit the payment of the annual license to be made in quarterly installments does not change the express provision that the twenty-five dollar (\$25.00) tax levied against each licensed pilot is payable annually, that is, the full \$25.00 must be paid during each fiscal year.

As to your third inquiry, it will be noted that Section 43, supra, contains the following provision:

"Whenever the funds in the Treasury of the Board exceed the sum of two thousand dollars (\$2,000) such excess shall be paid over to the Treasury of the State of Alabama "

The above language is clear, concise and unambiguous and admits of no construction. *State v. Praetorians*, 226 Ala. 259, 146 So. 411; *State v. Tusca-*

loosa Building & Loan Ass'n., 230 Ala. 476, 161 So. 530; **Bozeman v. State**, 7 Ala. App. 151, 61 So. 604; **Daly v. State**, 13 Ala. App. 310, 69 So. 338.

You are, therefore, advised that upon the funds in the treasury of the State Pilotage Commission or Board reaching and exceeding \$2,000., the excess of such sum should be immediately paid into the State Treasury.

In answer to your fourth question, I advise that the State Pilotage Commission or Board is without authority to allow a number of pilots to operate during any fiscal year without paying their annual license or privilege tax. As heretofore set out, the said tax is levied annually, and the mere fact that the collection of said tax may have caused the funds in the treasury of said Commission to exceed \$2,000. would not warrant this action.

I, therefore, advise you that each pilot should pay all unpaid license or privilege tax to date; and, if such collections result in the State Pilotage Commission or Board having in its treasury a sum in excess of \$2,000., then such excess should be immediately paid over to the State Treasury.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 21, 1940.

Hon. W. W. Boswell,
Sheriff, Geneva County,
Geneva, Alabama.

Public Health—Under Act No. 366, S. 116, approved September 12, 1939 (General Acts, 1939, page 486), County health officer authorized to write an order for the arrest and commitment to jail of any persons infected with venereal diseases who have refused to take treatment for the same as required by law.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 16, 1940, in which you request my opinion as follows:

“Under Section 366 in regard to person or persons infected with venereal diseases, under what authority does the Health Doctor commit such person or persons to the County Jail? Under a commitment written out by him, or under a warrant sworn out by Health Doctor?”

In reply, I wish to advise that the answer to your question is controlled by the provisions of Act No. 366, S. 116 approved September 12, 1939 (General

Acts, 1939, page 486). By your reference to Section 366, I assume you mean this act, which is number 366. You will note that the above named act of the 1939 Legislature amends Section 1106 of the Code of 1923 to read as follows:

"Section 1106. PERSONS REQUIRED TO BE TREATED.—The County Health Officer shall require all persons infected with a venereal disease to report for treatment to a reputable physician and continue treatment until such disease, in the judgment of the attending physician, is no longer communicable or a source of danger to public health. When such infected persons are unable to pay the attending physician's fees and in his judgment are indigent, they shall submit to treatment at public expense until discharged by the physician in charge of the clinic. Whenever in the judgment of the County Health Officer such a course is necessary to protect the public health, persons infected with venereal disease shall be isolated or quarantined. But whenever a person or persons infected with venereal disease shall refuse to take and continue treatment, as provided in this section, such person or persons may be committed to the county or city jail on order of the County Health Officer or physician in charge of a venereal disease clinic, and kept there for treatment until no longer a source of danger to the public health. Cost of feeding and keeping such person or persons shall be at the expense of the city in the event such person or persons reside in an incorporated municipality; otherwise, the same shall be at the expense of the county."

In my judgment, the specific authority of the county health officer for the procedure named by you is found in the following language of the above quoted law:

"But whenever a person or persons infected with venereal disease shall refuse to take and continue treatment, as provided in this section, such person or persons may be committed to the county or city jail on order of the County Health Officer or physician in charge of a venereal disease clinic, and kept there for treatment until no longer a source of danger to the public health."

In my opinion, the last above quoted provision of law provides authority for the county health officer or the physician in charge of a venereal disease clinic to write an order under which a person infected with a venereal disease, and who refuses to take treatment as provided for in the above quoted act of 1939, may be committed to the city or county jail, as provided for in the above named law.

I wish to further refer you to an opinion of the Attorney General addressed to Dr. J. N. Baker, State Health Officer, Montgomery, Alabama, under date of November 14, 1939, which is reported in Quarterly Report of Attorney General, Vol. XVII, page 252, copy of which is enclosed for your convenience.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 21, 1940.

Hon. E. M. Boyles,
Sheriff, Marshall County,
Guntersville, Alabama.

Sheriffs—Extradition—

Expenses incurred by sheriff in coming from his home to Montgomery for the purpose of obtaining extradition papers to extradite a prisoner from some other state is not an item of expenses incurred in such extradition.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 9, 1940, in which you request my opinion as follows:

"Some seven years ago, one, Dude Middlebrooks, a colored boy, was indicted for miscegenation. He was at the time a fugitive from justice. I learned he was in Chattanooga, Tenn. I contacted the officers in Chattanooga, who picked him up and arrested him on the 22nd day of January, 1940.

"They called me by long distance, and on the 22nd day of January, 1940 about 7:30 A. M. informed me that he would fight extradition and unless I had extradition papers in their hands by ten o'clock A. M. on Wednesday, the 24th of January, 1940, that he would be released, and he would, therefore, again become a fugitive. Realizing that the only way to prevent him from escaping from the arrest and being brought to trial after the white woman involved has already plead guilty and served her sentence, I got in my automobile and drove to Montgomery, Alabama, on the 22nd and obtained the request for requisition from the Governor. These expenses amounted to approximately \$29.00.

"I then on the 23rd of January, drove from Guntersville, Alabama, by automobile to Nashville, Tennessee, presented the request of the Governor of Alabama to the Governor of Tennessee for the requisition which was obtained on that date, and then drove back to Chattanooga on the same date and obtained the custody of the negro and brought him to Guntersville. All of this expense amounted to One Hundred Four or Five Dollars, the exact figures I don't have at my disposal at this moment. This all was necessary to be done and created, or the negro would have become a fugitive again. The expenses have been allowed to me for all of the trips, except the trip to Montgomery, Alabama, this is being rejected by the Comptroller's office.

"The question that I want to propound to you is this expense of \$29.00 or approximately that amount a legal expense under the conditions above set forth, and can this be legally paid me by the State of Alabama?"

In answering your request, I call your attention to Section 24 of Act No. 482, H. 391, approved July 22, 1931 (General Acts, 1931, page 559) which is as follows:

"Section 24. (Costs and expenses.) When the punishment of the crime shall be the confinement of the criminal in the penitentiary, or by death, the expenses shall be paid out of the state treasury, on the certificate of the Governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose Governor the requisition is made, and not exceeding Ten cents a mile for all necessary travel in, returning such prisoner." (Italics supplied)

I also call your attention to Section 3749, Code of Alabama, 1928 (Michie), which is as follows:

"Section 3749. Expense of bringing back absconding felon on requisition; how paid.—Any sheriff or other person commissioned as agent of this state to receive from another state any prisoner for removal to this state to answer a charge of felony, is entitled to receive actual expenses and two dollars per day while going to and returning from the place where the prisoner is arrested or confined, to be paid, on the approval of the governor, as in other cases of removal of prisoners by sheriffs."

These two sections must be construed in *pari materia* so as to be able to determine just what these expenses should be. You will note Section 3749, *supra*, provides in part:

"* * * is entitled to receive actual expenses and two dollars per day while going to and returning from the place where the prisoner is arrested or confined, * * *."

I think this section definitely fixes the extraditing officer's per diem at two dollars per day **while going to and returning to the state where the fugitive is arrested and confined**, and also provides for actual expenses. I am of the opinion that Section 24 of the Act of 1931, *supra*, being a later enactment, places a maximum limitation on the "actual expenses" provided for in Section 3749, *supra*.

You will note that Section 24, *supra*, provides, among other things, "and not exceeding ten cents a mile for all necessary travel in returning such prisoner." This, in my judgment, was evidently intended to take care of mileage along with lodging and meals.

What does the expression "actual expenses" mean? Does it mean all the expenses incurred by the officer, including expenses in coming to Montgomery and procuring the extradition papers and then his expenses in going to and returning from the state where the fugitive was arrested, or does it mean the actual expenses incurred from the county seat of the county where the defendant is charged with the crime to the state where the fugitive is located and returned? I am of the opinion it only includes the latter, as certainly the expenses incurred preparatory to going for the fugitive could not be said to be expenses of extraditing the defendant, for, when application is filed with the governor, the chief executive might refuse to grant the same.

It is my opinion that the Legislature in passing these statutes contemplated that preliminary proceedings in procuring requisition papers be made by mail. I realize that often an emergency arises like you have, but such emergency cannot be made an exception to the rule. Therefore, it is my opinion that the expenses incurred by the officer in coming to Montgomery for the purpose of procuring extradition papers for a fugitive in a foreign state cannot be said to be a part of the expenses of the extradition.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 21, 1940.

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Phenix City, Alabama.

Candidate may file his designation of committee to receive and expend funds as required under provisions of Section 588, Code of Alabama, 1923, within five days after announcement of declaration of candidacy, regardless of the fact that the time such committee designation is filed is after the deadline prescribed for qualifying with party officers.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 11, 1940, in which you request my opinion as follows:

"One of the candidates of Russell County filed his declaration of candidacy with the Chairman of the Executive Committee and paid his qualification fees on the 26th of February, but did not file a copy of same with me until the 2nd day of March, he mailed it from Hurtsboro, and it was postmarked as of March 1st, and I received it on the 2nd. Also one Chas. W. Edwards who is candidate for Presidential Elector, Third Congressional District, his declaration of candidacy was not signed until the 4th of March, and I received it on the 5th. I will thank you to advise me by return mail whether these two will be entitled to have their names placed on the ticket."

I understand from your letter that you are concerned with whether or not the candidates referred to in your letter have complied with the provisions of Section 588 of the Code of Alabama of 1923, which section is as follows:

"Section 588. Committee to receive, expend, audit and disburse money or funds contributed.—Any candidate shall, within five days after

the announcement of his candidacy for any office, if the office be a state office, file with the secretary of state, and if the office be a county office, file with the judge of probate of said county, and if it be a district or circuit office, file with the judge of probate of each county which is embraced in said district or circuit, the name of not less than one nor more than five persons elected to receive, expend, audit and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such person to act as such committee, but any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose. Such committees shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may file such vacancies, or the remaining members shall discharge and complete the duties required of said committee as if such vacancy had not been created. No candidate for nomination or election shall expend any money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid."

This conclusion is very evident in so far as the candidate first mentioned in your letter of inquiry is concerned, for there you very definitely state that he had qualified with the proper party authorities on or before March 1, which is the deadline fixed by Section 12 of Act No. 56, H. 73, approved February 25, 1931 (General Acts, 1931, page 70, 76), generally referred to as the 1931 Primary Act.

The facts set out in your letter of inquiry in regard to Mr. Edwards, who you state is a candidate for presidential elector, are not as evident, but I am assuming that when you state that his declaration of candidacy was not filed until the fourth of March and received by you on the fifth of March, you refer to the committee designation, which is required by Section 588 of the Code of Alabama, 1923, *supra*. I assume that you referred to this as a declaration of candidacy, in view of the fact that the form generally used by candidates who file with the proper party authorities likewise contains the committee designation required by Section 588, *supra*. For the purposes of this opinion, therefore, I am assuming that Mr. Edwards was properly qualified with the proper party official on or before March 1, 1940, and filed his committee designation with you on March 5, 1940.

If the facts heretofore assumed by me are true, I am of the opinion that both of the candidates are entitled to have their names placed on the ballots. In both instances, the committee designation was filed with you within five days after the announcement of candidacy of each of these gentlemen, there being nothing in your request to indicate that either of them had ever in any way announced their candidacy in such a way as to come within the provisions of Section 588, *supra*, prior to the date on which they qualified with the proper party official.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 22, 1940.

Hon. Douglas L. Cannon,
Director of County Organization,
Department of Public Health,
Montgomery, Alabama.

Public Health—County Health Officers—

No authority for expenditure of county health funds for membership dues or fees for county health officers in chambers of commerce, councils, or social agencies and other agencies of like nature.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 8, 1940, in which you request my opinion as follows:

"Your opinion is sought in the following matter: May funds of a county health department be used for organization membership dues? That the purpose of the inquiry may be more fully understood, let me quote as follows from letter received from one of our county health officers:

"In requesting opinion regarding organization membership dues, please mention specifically chambers of commerce, councils of social agencies, and other local agencies having as their general objective promotion of community progress, and in which membership is with the specific objective of advancing the purposes of the agency, or of the firm or industry, represented in the vocation of the individual. Our Council of Social Agencies is the best illustration, I think, though the membership fee is so small as to be insignificant. One belongs as a representative of an agency devoted to public welfare, though all have restrictive policies as to groups served, of course. The Council itself is aimed at advancement of public interests, without evident purpose or means of individual profit except in the manners in which any person may profit indirectly because of effective service."

"It has been the view of the State Department of Health that any reasonable expenditure that would enhance the value of the work of the county health department would be legitimate, but lest question should arise regarding this, your guidance is respectfully sought."

In reply, I wish to advise that I have carefully studied Chapter 31, and particularly Section 1058 of the Code of Alabama, 1923, as amended, which outlines the duties, power and authority of county boards of health and county health officers. If authority exists for the expenditure named by you it must be found in Subsection 12 of Section 1058 of the Code of 1923, as amended by Act No. 443, S. 247, approved September 13, 1935, General Acts, 1935, page 918, which provides as follows:

"1058. Duties of county health officers prescribed.—It shall be the duty of the county health officer: * * * (12) To occupy an office in the courthouse of the county, to be assigned by the court of county commissioners, or other like board; and in the event that an office in the courthouse is not available the same court or board may in its discretion provide an office for him conveniently located with reference to the courthouse; and the court of county commissioners, or other like board may in its discretion appropriate from the revenue of the county such sums as are found necessary to furnish and equip the office of the county health officer with all necessary supplies, and furnish all necessary clerical help, transportation, and other expenses of the county health officer, and may in its discretion appropriate, from the revenues of the county, money for the prosecution of public health work which has been recommended by the county health officer and indorsed by the county board of health and approved by said court of county commissioners, or other like board."

In my judgment, no expenditures may be made for purposes not directly contemplated by the above quoted provisions of law. It is my opinion that the expenditures named by you cannot be said to be within the purview of the above quoted section of law, and since I know of no other authority of law which would permit these expenditures from public health funds, I therefore answer your question in the negative.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 22, 1940.

Hon. W. H. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Tractors—Schedule 22. B. of Schedule 22 of the 1935 Revenue Act, as amended—Schedule 12 of the 1935 Revenue Act, as amended.

A person who secures a license under Schedule 12 of the 1935 Revenue Act, as amended, is not required to secure a license under the provisions of Schedule 22. B. of Schedule 22 of the 1935 Revenue Act, as amended.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated March 7, 1940, which follows:

"Schedule 22-B of Alabama Revenue Laws—Quote—'Each person other than a licensee under Schedule 12 of Section 348 hereof for engaging in the business of dealing in Tractors, road machinery or trailers, shall pay the following license.'

"If dealer should be served with citation for Tractor license, he would have to be cited under this schedule, and the license under this schedule.

"It appears to us that it is perfectly plain that if he is licensed under Schedule 12 he does not have to purchase, or rather is not liable under Schedule 22-B."

It is my opinion that a person who secures a license under Schedule 12 of the 1935 Revenue Act, as amended, is not liable for the license imposed by Schedule 22. B. of Schedule 22 of the 1935 Revenue Act, as amended, for engaging in the business of selling tractors.

Schedule 12 of the 1935 Revenue Act, prior to its amendment in 1939, read in pertinent part as follows:

"Upon each and every agent of and/or dealer in and upon every person soliciting orders for the sale or purchase of automobiles, motor cars, or other self propelled vehicles, except motorcycles."

It appears from the above that a person engaged in the exclusive business of selling tractors would be required to purchase a license under this schedule.

In 1937, the Legislature amended Schedule 22 of the 1935 Revenue Act by adding thereto Schedule 22. B. This amendment was by Act No. 156, S. 75, approved March 2, 1937 (General Acts 1936-37, Extra Session, page 178), which reads in pertinent part as follows:

"Schedule—22. B.—Each person other than a licensee under Schedule 12 of Section 348 hereof for engaging in the business of dealing in Tractors, road machinery or trailers, shall pay the following license." (Emphasis supplied)

It is my opinion that the purpose of this amendment was to allow a person who was engaged exclusively in the business of selling tractors, road machinery, or trailers, to purchase a license under this schedule, which, as will be noted, is materially lower than the license imposed by Schedule 12, supra. In my opinion, even after Schedule 22. B. was adopted, a person could secure a license under Schedule 12, supra, and engage both in the business of selling automobiles and tractors. In other words, if a person secured a license under Schedule 12, supra, to engage in an automobile business, and at a later date decided to put in a line of tractors in connection with his automobile business, he would not be required to purchase the additional license imposed by Schedule 22. B. of Schedule 22, as amended, supra. Said Schedule 22. B. applies only to those persons engaged exclusively in the business of selling tractors, road machinery and trailers.

In 1939, Schedule 12 of the 1935 Revenue Act, *supra*, was amended by Act No. 370, H. 325, approved September 22, 1939 (General Acts, 1939, page 497) to read in pertinent part as follows:

"Schedule 12. Each person dealing in, selling or purchasing for resale automobiles, trucks or other self-propelled vehicles, other than motorcycles, tractors or other motor vehicles otherwise licensed, shall pay an annual State license as provided below, and shall pay a county license of one-half of the amount of his State license for the use of the counties."

In my opinion, the only effect of the above quoted amendment to Schedule 12 was to decrease the license heretofore imposed on dealers in automobiles, trucks, etc. by Schedule 12 as it originally appeared in the 1935 Revenue Act. This amendment does not in my opinion do away with the exceptions granted by Schedule 22. B. of Schedule 22, as amended, *supra*. That is to say, a person who secures a license under Schedule 12, as amended, will not be required to secure an additional license under Schedule 22. B. of Schedule 22, as amended, *supra*.

The language of Schedule 22. B. of Schedule 22, as amended, *supra*, is clear and concise in that a licensee under Schedule 12 of the 1935 Revenue Act (or under Schedule 12, as amended, *supra*, in my opinion) is specifically exempted from the purchase of a license thereunder. Therefore, this language being clear, concise and unambiguous, there is no room for construction and the wording of the statute must be followed. *State v. Praetorians*, 226 Ala. 259, 146 So. 411.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 22, 1940.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Solicitor's fees—Section 4247, Code of 1923.

Persons convicted in Circuit Court of violating Section 4247 of the 1923 Code of Alabama are liable for \$150.00 Solicitor's fee, unless case was appealed from county or inferior court, and Solicitor's fee was there taxed, in which event no Solicitor's fee attaches on conviction in Circuit Court.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion dated March 18, 1940, has been received. The request follows:

"I respectfully ask your opinion on the following question, viz:

"What is the correct Solicitor's Fee the Clerk should charge in a conviction where Defendant is convicted of the offense of violating Section 4247 of the Code of Alabama of 1923?"

Your attention is called to Section 3738 of the Code of 1923 which section fixes the fees and commissions for solicitors and reads in pertinent part as follows:

"3738. The following solicitors' fees shall be taxed against the defendant on conviction, to be collected as other costs, and paid into the county or state treasury, as may be authorized or required by law,—that is to say: For each conviction under section 4237(6985), or 4247 (6997) _____ \$150.00."

It appears from the above that persons convicted for violating Section 4247 of the Code of Alabama of 1923 shall have taxed against them and collected as other costs a Solicitor's fee in the sum of \$150.00.

However, your attention is called to the fact that the Court of Appeals in the case of **Cooper v. The State**, 187 So. 500, held that when a misdemeanor case was appealed from a county or inferior court to the Circuit Court, and a Solicitor's fee had been charged in the county or inferior court, no additional Solicitor's fee should be assessed or collected in the Circuit Court. The Supreme Court affirmed this holding in **Ex Parte County Commission of Jefferson County, Cooper v. State**, 337 Ala. 533, 187 So. 503.

This opinion deals only with the general law of the State. I have not considered any general law with local application or any local law applicable to Mobile County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 23, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

The dismissal of a case against a defendant by a justice of the peace is not the same as an acquittal of a defendant within the meaning of Subsection 2 of Section 3850 of the Code of Alabama, 1923 and, therefore, a justice of the peace cannot legally collect costs in that case from fines and forfeitures collected by him in other cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 18, 1940, in which you request my opinion as follows:

"Kindly give me your answer to the following question:

"1. Where a case before a justice of the peace, of which he has jurisdiction, is dismissed for want of prosecution before the defendant is placed in jeopardy, can such justice of the peace collect the costs in such a case under Subsection 2 of Section 3850, Code of Alabama, 1923, Michie?"

Subsection 2 of Section 3850 of the Code of Alabama, 1923, is in words and figures as follows:

"Section 3850. Required to keep docket and exhibit it to grand jury; other duties.—It is the duty of every justice of the peace and notary public having and exercising the jurisdiction of justices of the peace— * * *

2. To collect all fines imposed where the defendant is not sentenced to jail or hard labor to pay same; or an appeal is taken. He may deduct from fines and forfeitures collected by him, the amount due for his fees and those of the constable in cases in which the defendant was acquitted, or insolvent and unable to pay after conviction, a sum not to exceed fifty dollars for any calendar month; he shall pay the remainder of the fines and forfeitures collected by him to the treasurer or to the custodian of the county funds where there is no county treasurer, same to be paid semi-annually on the first Mondays in January and July of each year, and make his report at the next session of the grand jury; if he should fail to make such payments as herein provided, he shall forfeit all right to make any deduction from his collections for cost due him and the constable for fees as herein provided."

A justice of the peace may not take from fines and forfeitures collected by him the costs in a case which has been dismissed by him before the defendant is in any way put in jeopardy. Such a dismissal is not, in my opinion, tantamount to the word "acquitted" as used in the above quoted section. The question here presented is practically analogous to the question which we answered in an opinion to you under date of February 27, 1940.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 23, 1940.

Hon. Roy Mayhall, Attorney,
Winston County Highway Board,
Haleyville, Alabama.

In the creation of the Highway Board, of Winston County, the Commissioners' Court of said county was divested of all its power

in connection with highways, bridges and funds belonging to the same, such powers being vested in the Highway Board. This being true, the members of the Commissioners' Court cannot be paid their per diem for any services rendered in connection with the highways and bridges after the local act became effective.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 21, 1939, in which you request my opinion as follows:

"Your opinion is desired by the Winston County Highway Board and the Probate Judge of this County in connection with the following matter:

"The 1939 Legislature passed a local act creating a Highway Board for Winston County. This act was approved by the Governor on September 5th. The Probate Judge and County Commissioners refused to deliver the road machinery to the newly created Board, and a bill for declaratory judgment was filed by the members appointed to the Highway Board. These members received their appointment from the Governor.

"In order for the WPA to operate in the County during the pendency of the suit, an agreement was made between the Highway Board and the Commissioners' Court, whereby the Commissioners would continue to operate, especially on WPA projects. I am enclosing herewith a copy of the agreement made between the two bodies. The County Treasurer continued to handle the gasoline tax funds received from the State of Alabama during the pendency of the litigation. The Commissioner's Court, having charge of the funds, paid themselves their \$3.00 per diem for the months of September and October.

"The Supreme Court upheld the validity of the Act on December 7th, and the funds received from the State for gasoline tax due Winston County was delivered by the County Treasurer to the new Highway Board on or about December 8th. This represents the amount due for the month of November. The Commissioners have filed a per diem claim with the new Highway Board for the month of November and up to the 7th day of December, 1939. The Highway Board is holding the claim, pending your opinion as to whether the same can be legally paid to the County Commissioners for the services rendered after the approval of the local act which diverted authority over the road and bridge funds from the Commissioners' Court to the newly created Highway Board.

"The question: Can the Winston County Highway Board legally pay to the Commissioners any amount for their services rendered for supervision over the roads of Winston County on a properly filed claim, for the month of November and up to the 7th day of December, 1939?

"Question: Can the Highway Board, by proper resolution entered upon their minutes, legally make payment to the Commissioners for their

services by designation them as Supervisors, during the month of November, and up to the 7th of December, 1939?

"You will note that the agreement enclosed herein states that the funds allotted to each District could be used as the Commissioners saw fit, and the Highway Board wishes an opinion in order that they will not be charged with an illegal payment.

"This opinion is requested at the instance of Mr. Joe V. Robinson, Chairman of the Highway Board, Hon. Frank M. Johnson, Judge of Probate of Winston County, and the undersigned as County Solicitor of Winston County."

My answer to your first inquiry is in the negative. A local act was passed and approved on September 5, 1939, which act established a Highway Board for the County of Winston (Act No. 333, H. B. 815, approved September 5, 1939—Mayhall), and in establishing this Board all the power, supervision and control of the roads, bridges and funds pertaining to same were divested from the Commissioners' Court of said county and invested in the Highway Board. If the act was constitutional and legal in all respects, it became operative the minute it was approved by the Governor for the reason that Section 10 of said act provides as follows:

"Section 10. That this act shall take effect immediately upon its approval by the Governor."

I find that the Highway Board, or the members of same, filed in the Circuit Court in Equity a petition for a declaratory judgment against the Commissioners' Court, or the members of said court, in Winston County, seeking to test the validity of the act establishing the Highway Board. On the hearing of this petition the Circuit Court of Winston County held adversely to the Commissioners' Court, upholding in all respects the validity of the local act establishing the Highway Board. From this holding or decree the Commissioners' Court appealed to the Supreme Court of Alabama, and on the 9th day of December, 1939, the Supreme Court unanimously, in an opinion by Mr. Justice Brown, upheld the Circuit Court and affirmed the case. In so doing, the Court settled the question of the validity of the local act. See case of **Frank M. Johnson et al v. Joe V. Robinson, et al**, 192 So. 412.

The above being true, the local act establishing the Highway Board of Winston County became operative and effective on September 5, 1939, the date of its approval, and by its terms removed from the Commissioners Court all power, supervision and control of the roads, highways and bridges of Winston County and the funds connected with the same, and conferred the same on the Highway Board of that county. When this was done, the Commissioners' Court had no more control or supervision of the roads, highways and bridges of Winston County than a private individual could have had.

I have read the agreement dated September 14, 1939, entered into by and between the Commissioners' Court and the Highway Board of Winston County. It can be seen that at the time this agreement was entered into the local law creating the Highway Board had in fact been in effect for ten days and no agreement entered into by and between the Commissioners' Court and the Highway Board could be construed to suspend the operation of the local act, *supra*. When the local act was approved by the Governor it became the law of the realm so far as Winston County was concerned and could not be made inoperative or suspended for any length of time by any

agreement between the two boards or commissions. Therefore, it is my opinion that the Highway Board is without authority by resolution or otherwise to pay the Commissioners' Court their per diem out of any monies which are now or which may hereafter come into the hands of such board.

Your second inquiry also must be answered in the negative. See Section 5024 of the Code, as amended by Act No. 193, H. 300, approved March 2, 1937 (General Acts, Special Session, 1936-37, p. 225) and Section 6070 of the Code of 1923.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 25, 1940.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Statutes—Act No. 59, S. 55, approved March 2, 1939, General Acts, 1939, p. 86—Jury Commission—

Jury Commissioner entitled to per diem if he performs any substantial service on any particular day. Judge of Probate may demand satisfactory proof before issuing warrant under said act.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of March 16, 1940, in which you request my opinion as follows:

"I want to ask you to give me an opinion on Section 5 of the Act establishing a Jury Commission, approved March 2, 1939, on the following points,

"First: What is meant by the word per day, I mean by that, if the Jury Commission serves, say three or four hours in a day, would the Probate Judge be required to pay said Jury Commissioners for a full day's work

"Second: What is meant by the words, 'Upon evidence satisfactory to him that such service has been rendered?'

"You will notice that the responsibility seems to be upon the Probate Judge to pay these Commissioners after being convinced that they have put in the time that they asked to be paid for."

I call your attention to Section 5 of Act No. 59, S. 55, approved March 2, 1939, (General and Local Acts, Pamphlet Edition, 1939, p. 86) which provides as follows:

"Section 5. Each member of the Jury Commission shall be paid the sum of Five Dollars (\$5.00) per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the County treasury upon the warrant of the probate judge of the county. **Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered;** but the compensation of each member of the Commission shall not exceed for any year of his term the following amounts, viz: In counties of twenty-five thousand population, or less. One Hundred Dollars (\$100.00); in counties exceeding twenty-five thousand and not exceeding fifty thousand population Two Hundred Dollars (\$200.00); in counties exceeding fifty thousand and not exceeding seventy-five thousand population Three Hundred Dollars (\$300.00); and in counties exceeding seventy-five thousand population Six Hundred (\$600.00); the population of said respective counties to be determined by the last preceding Federal census." (Emphasis supplied)

Where a statute fixes an officer's compensation at a certain sum per day, such officer performing any substantial service on a particular day has a right to a per diem compensation for that day. 46 C. J. 1018.

That part of the statute which states that "such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered," means the probate judge could require evidence that the Jury Commissioner had performed some substantial service on the particular day or days. This does not mean the probate Judge could make an unreasonable demand upon the various Jury Commissioners but that some evidence should be produced showing some substantial service was rendered on those days for which the Jury Commissioner claimed his per diem.

A statement from the Jury Commissioner making a claim that he had performed substantial services on a particular day would be sufficient authority for the Judge of Probate to issue the warrant.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 27, 1940.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture & Industries,
Montgomery, Alabama.

Gasoline inspection fees—

1. Collection on gasoline sold to Federal Government—Inspection fee may be collected where gasoline sold to Federal Government, but cannot be collected where the gasoline is sold and delivered on Federal reservations ceded to the Federal Government by the State.

2. Post exchanges are not instrumentalities of the Federal Government.

3. Motor fuel sold to counties and cities for official use is not exempt from inspection fees.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 21, 1939, in which you request my opinion as follows:

"On June 23 this Department asked for an opinion concerning the inspection fee in gasoline. It now appears that there were certain inaccuracies in the statement of facts in our letter of June 23. It is, therefore, requested that that letter be withdrawn, and that your opinion be given us as follows:

"Your attention is invited to Section 185 of the Agricultural Code of 1927, as amended by Section 9 of an Act of the Legislature, approved February 5, 1935. That Section stipulates that—

"It shall be the duty of the person, firm or corporation first selling in or for importation into this State gasoline, benzine, naphtha or other liquid motor fuels to pay said inspection fee, provided if such person, firm or corporation fails to pay said inspection fee, the Commissioner shall require the payment of said fees from such other person, firm or corporation as may receive such commodity upon which the inspection fee has not been paid.

"This Section also provides that such 'inspection fees shall constitute and operate as a lien,' until such fee is paid.

"We desire your opinion as to whether Refiners, Wholesalers, or Brokers may deduct from their payment amounts which would otherwise be due on sales made to government agencies, that is to say can such motor fuel finally sold to government agencies, be required to pay the inspection fee, and whether gasoline sold at such government agencies through Post Exchanges to private individuals, may be subject to such inspection fees.

"Also whether such motor fuels sold to counties and cities for official use may be exempted from such fees."

As I understand your inquiry, the first question concerning which you desire my opinion is whether the State has the power to collect its fee for inspection of gasoline bought by the United States from a distributor in this State.

The laws of this State (Agricultural Code of Alabama, 1927, Article 20, Sections 177-193, as amended by Act No. 27, H. 59, approved February 5, 1935, General Acts, 1935, p. 45) provide for the adoption of gasoline standards and the inspection of gasolines and other motor fuels, and, for the purposes of defraying the expenses of the inspection and regulation, "a charge of one-fortieth of one cent for each gallon" of gasoline etc. is made. This charge is styled "an inspection fee" (Section 185, as amended).

It is not a tax for the support of the State, but a fee for the service of inspecting as is shown by the following section:

"Section 9. INSPECTION FEE.—For the purpose of this Act, an inspection fee of one-fortieth of one cent for each gallon of gasoline, benzine, naphtha, or other liquid motor fuel, sold or offered for sale in or for importation into the State, shall be paid to the Commissioner of Agriculture and Industries on or before the twentieth day of each month on all of said products so sold during the preceding calendar month and each remittance shall be accompanied by a certificate stating that the amount remitted is correct and that the gasoline, benzine, naphtha, or other liquid motor fuel so sold was of legal standard. Said inspection fee herein provided shall be paid but once on the same product, but for failure on the part of any person, firm or corporation to make the payment herein provided for on or before the twentieth day of each month, the Commissioner of Agriculture shall be and is hereby authorized to add ten per centum to the amount of such inspection fees already due as a penalty for the failure of such person, firm or corporation to make such report and payment on the date herein provided and shall proceed to collect such inspection fees, together with all costs incident to such inspection, including the penalty. It shall be the duty of the person, firm or corporation first selling in or for importation into this State gasoline, benzine, naphtha or other liquid motor fuels to pay said inspection fee, provided if such person, firm or corporation fails to pay said inspection fee, the Commissioner shall require the payment of said fees from such other person, firm or corporation as may receive gasoline, benzine, naphtha, or other liquid motor fuel upon which the inspection fee has not been paid. The inspection fees shall constitute and operate as a lien, at all times until paid, upon any gasoline, benzine, naphtha or other liquid motor fuel sold or offered for sale in or imported into this State and shall be enforceable immediately when due, by the Commissioner in the same manner as tax liens of the State upon personal property of a delinquent taxpayer are enforceable."

Inspection requirements of the type imposed by Article 20, as amended, are common, and reasonable State charges therefor have been invariably upheld by the United States Supreme Court under the Commerce Clause notwithstanding its holding that no state may lay a tax affecting or burdening interstate commerce. **Red "C" Oil Co. v. Department of Agriculture**, 222 U. S. 380 (upholding a North Carolina fee of one-half cent a gallon on kerosene); **Pure Oil Co. v. Minnesota**, 248 U. S. 158, 63 L. Ed. 180, an annotation.

No decision has been found directly passing upon the authority of a state to collect such a fee upon gasoline purchased by the United States. I am of the opinion, however, that the fee may be collected by the state for the inspection of such gasoline. The Federal Constitution does not, in my opinion, prohibit the collection, and I have not found that Congress has done so, although the Act of Congress of June 16, 1936, (T. 23, U. S. Code, Section 55(a)) apparently prohibits state sales taxes on gasoline bought for "the exclusive use of the United States." Such taxes were also held void in **Panhandle Oil Co. v. Knox**, 277 U. S. 218, 56 A. L. R. 583, and in **Graves v. Texas Co.**, 298 U. S. 393. But as pointed out above, the gasoline inspection fee is not a tax for state support and those cases do not, therefore, prohibit such a fee.

In **Tirrell v. Johnston**, 86 N. H. 530, 171 A. 641, it was held that a Federal mail carrier, who was assumed to be a Federal officer or instrumentally, was liable for a reasonable fee or charge for the use of the State highway, such fee or charge not being a tax for state support, which admittedly would be void under **McCullough v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579, and the line of cases following that decision. The **Panhandle Oil Co.** case was distinguished on the ground that the gasoline sales tax there was a tax for state support, not a fee for proper services rendered. The court said:

"Two fundamental ideas expressed in **McCullough vs. Maryland**, 4 Wheat, 316, are believed to furnish all the general rules for testing the validity of demands by the local from the general government. The charge must not interfere with the performance of the general functions of the general government, and it cannot call upon that government to bear the expenses of local government. Neither of these propositions afford any ground for a conclusion that the State may be called upon to furnish gratis to the nation anything for the use of which it is entitled to compensation from all others. Equal treatment is of course required. Beyond that, any requirement that the State give free or exceptional service to the nation, would be to deny to the State the protection from Federal imposition of precisely the same character as that condemned when attempted by State legislation against the general government. * * * It having been Federally determined that this State does not go beyond a demand of compensation for facilities furnished, it is not a tax, in the sense of a burden put upon Federal activities. Nor is it a demand that the general government contribute to the support of the State. To put it in every day phrase, it is a claim that the general government should pay for what it wishes to buy or use."

This decision was affirmed per curiam, 293 U. S. 533, 55 S. Ct. 238, 79 L. Ed. 641.

In **Federal Land Bank v. Crosland**, 261 U. S. 374, 43 S. Ct. 385, 67 L. Ed. 703, land banks were declared by Congress to be Federal instrumentalities, hence free from state taxation. An act of Alabama provided that no mortgage should be put to record unless a license or privilege tax thereon be paid. The opinion of Mr. Justice Holmes distinctly recognizes that while a tax against the bank would be had, a reasonable charge for registering would be good, concluding:

"Of course the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. **Foot v. Maryland**, 232 U. S. 494, 34 S. Ct. 377, 58 L. Ed. 698."

In **James v. Dravo Contracting Co.**, 302 U. S. 134, 114 A. L. R. 388, and **Silas Mason Co. v. Tax Commission**, 302 U. S. 186, it was held that although state license taxes on federal contractors increased the cost of performing governmental contracts, that fact did not invalidate the taxes. And in **Liggett Meyers Tobacco Co. v. United States**, 299 U. S. 383, it was held that

a federal tax on the manufacturing of tobacco created no prohibited burden on state purchases, although the tax was postponed until removal or sale.

In my opinion, the foregoing authorities sufficiently indicate that the State of Alabama has the power to collect its inspection fees on gasoline subsequently bought in this State by the United States for its use.

You next inquire "whether gasoline sold at such government agencies, through post exchanges to private individuals may be subject to such inspection fees." If, by this question, you refer to sales made on territories purchased by the Federal Government with the consent of the State of Alabama, you are advised that the Supreme Court of Alabama has held in the recent case of **State v. Blair**, 191 So. 237, that such territories are without the jurisdiction of the State of Alabama and, therefore, such inspection fees could not be collected.

Your attention is called, however, to the fact that it has been held by the Federal courts in **Pan American Petroleum Corp. v. State of Alabama**, 67 F. (2d) 590, certiorari denied by the Supreme Court of the United States 291 U. S. 670, 78 L. Ed. 1060, that a post exchange is not the government nor is it a department or instrumentality thereof. Attention is also called to **People v. Standard Oil Co.**, 22 P. (2d) 2 (Calif.) wherein is found a very enlightening discussion of the character of a post exchange. You are, therefore, advised that if the gasoline is sold through post exchanges on territories over which the State of Alabama has not lost jurisdiction as noted in the Blair case, the inspection fee may be collected.

You next inquire whether the inspection fee on the gasoline and other fuels may be collected where such fuels are sold to counties and cities for official use.

As has been stated above, the imposition of the inspection fee is not for revenue but to finance the measures enacted for public protection and all arguments which support the exemption of cities or counties from revenue taxes are necessarily without force. All the reasons for inspection of these fuels fit the use of the fuels by the cities or counties as well as that of others. I have found no case which holds a municipality or a county to be exempt from such a fee. Your attention is particularly called to the case of **People v. City and County of Denver**, 84 Colo. 576, 272 P. 629, 630, wherein the Supreme Court of Colorado concluded that a statute quite similar to our own gasoline inspection law was applicable to sales of gasoline to the city and county of Denver.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 27, 1940.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama,

Where defendant was arrested, charged with a misdemeanor,
and committed to jail and thereafter released on bond approved by

the sheriff, and failed to appear when the case was set for trial, and the defendant rearrested on an alias warrant of arrest and again committed to jail, the sheriff is entitled to the following fees or allowances, among others, where conviction follows: (1) Two arrest fees; (2) two guard allowances; (3) a fee for each bond undertaken and returned to court.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 20, 1940, in which you request my opinion as follows:

"A prosecution is commenced in the Law & Equity Court against John Doe charging him with a misdemeanor charge of public drunkenness by a proper affidavit being made and a legal warrant of arrest being issued. Immediately thereafter the warrant of arrest was executed by the sheriff of the county by committing the defendant to jail. A few days later the defendant was released on a proper bond approved by the sheriff. The case was set for trial and when the case was called the defendant failed to appear and the court made an order forfeiting the bond and ordering an alias warrant of arrest to issue. The alias writ of arrest was issued by the clerk. The sheriff executed the alias writ of arrest by again committing the defendant to jail. A few days thereafter the defendant was again released on bail approved by the sheriff. Later the defendant was convicted on said charge in the Law & Equity Court.

"Is the sheriff entitled to one arrest fee of \$2.00 or is the sheriff entitled to two fees of \$2.00 each for executing the warrants of arrest?

"Is the sheriff entitled to one guard fee of \$2.00 or is the sheriff entitled to two guard fees in as much as the defendant was placed in jail twice in this case? How much guard fee is the sheriff entitled to?

"Is the sheriff entitled to one fee for approving the bonds or is he entitled to a fee for approving each bond? How much is the sheriff entitled to for approving the bonds?

"Is the sheriff entitled to more than one guard fee in any one case?"

Most of the questions presented in your letter of inquiry have heretofore been dealt with by this office and my answer to your inquiries are in accord with the views heretofore expressed by my predecessors in office.

Your first question as to whether or not the sheriff is entitled to two arrest fees under the circumstances detailed in your letter is specifically answered in the affirmative in an opinion rendered on February 21, 1929, to the Chief Examiner of Accounts (Biennial Report of Attorney General, 1928-30, page 194). A copy of this opinion is herewith enclosed.

It is my judgment that your second inquiry as to whether or not, under the facts outlined in your letter, the sheriff is entitled to two guard allowances is likewise answered in the affirmative by the opinion just above referred to. It therefore appears that the sheriff would be entitled to collect \$4.00 in guard allowances in that case.

In regard to your third inquiry, it is my opinion that the sheriff is entitled to receive a fee for each bond returned to court and, from the facts as presented in your letter of inquiry, it is my opinion that the sheriff would be entitled to collect a fee of \$2.00 for returning two separate and distinct bonds into court. You will note that under the provisions of Section 3741, Code of Alabama, 1923, as amended, the sheriff is entitled to the following fees: "Sheriffs are entitled to the following fees and allowances in criminal cases—that is to say: For each bond or undertaking returned to court, \$1.00."

Your last inquiry, wherein you ask: "Is a sheriff entitled to more than one guard fee in any one case?" was dealt with in my answer to your second request.

In addition to the opinion heretofore cited, a copy of which is enclosed, I also call your attention to an opinion rendered by this office on January 24, 1940, to the Chief Examiner of Accounts, a copy of which I am also enclosing.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 27, 1940.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—Street Fairs—

Act No. 391, H. 691, approved September 13, 1939 (General Acts, 1939, p. 515, Pamphlet), amending Schedule 133 of Section 348 of the Revenue Act of 1935, does not abrogate the exemption specified in Schedule 34 of Section 348 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 21, 1940, in which you request my opinion as follows:

"I am advised that Mr. Frank West owner of circus and carnival equipment with winter quarters in Montgomery, and who claims to be a citizen of the State of Alabama, whose property is assessed in Montgomery County and taxes paid thereon, desires to exhibit for a week in the City and County of Montgomery after breaking up winter quarters, provided he is entitled to the exemption from payment of license authorized in Schedule 34 of Section 348 of the Revenue Act of 1935. At the last session of the Legislature an Act was passed and approved on September 13, 1939 with reference to licenses to be paid by carnival companies.

"For my guidance I will be pleased to have your opinion as to whether or not a carnival company, since the passage of 1939 Act above referred to, is entitled to exemption from the imposition of a license under the conditions contained in said Schedule 34 of the Revenue Act of 1935."

I am of the opinion that your inquiry should be answered in the affirmative.

Schedule 34 of Section 348 of the Revenue Act of 1935 levies a license on each person operating a circus. Said schedule contains the following proviso:

"Provided that to the end that there may be no double taxation or license charged by this State, that the terms of this Act shall not apply to the operation or conduct of any street fair or carnival for the first four weeks' rehearsal performances after closing of winter quarters in this State, owned by any citizen of this State or by any corporation organized under the laws of this State and having its principal situs in Alabama and maintaining its permanent winter quarters in Alabama, whose property is subject to and pays to the State of Alabama a tax on its real and personal property under any law of this State."

Schedule 133 of Section 348 of the Revenue Act of 1935 provides as follows:

"Schedule 133. Each person operating or conducting an exhibition commonly termed 'Street Fair' or 'Carnival' shall pay to the State a license as follows: For an exhibition operating or composed of or controlling or embracing not more than ten exhibitions or devices three hundred dollars (\$300.00); but where more than ten and not exceeding twenty-five (25) devices, four hundred dollars, (\$400.00); and where there are more than twenty-five (25) devices, seven hundred and fifty dollars (\$750.00); for each place where said street fair is conducted. This license shall entitle the street fair to be operated for a period of not exceeding two weeks in any one place at any one time. Provided that where such street fair or carnival is operated by or under the auspices of State Fairs, County or District Fairs, the license shall be one-half of the above amounts. Provided that a State, County or District Fair shall be construed to mean a corporation or association composed of ten or more persons, which shall have been organized at least six months prior to the holding of the Fair, and which holds an annual fair and at which not less than twenty exhibits of agricultural, livestock or mineral products are shown and upon which prizes are offered."

The above quoted proviso of Schedule 34, *supra*, granted a rehearsal period exemption to street fairs or carnivals which came within the terms thereof. Such street fairs and carnivals were not liable for license imposed by Schedule 133, *supra*, during said rehearsal period. Cf. **Quarterly Report of Attorney General, Vol. XI, page 130.**

The question now presents itself as to whether by the enactment of Act No. 391, H. 691, approved September 13, 1939 (General Acts, 1939, p. 515, Pamphlet), amending Schedule 133, *supra*, the exemption contained in Schedule 34, *supra*, was abrogated or repealed. The 1939 act provides as follows:

"Section 1. That Schedule 133, of Section 348, of Article XIII, of 'An Act to provide for the general revenue of the State of Alabama,'

approved July 10th, 1935, be amended to read as follows: 'Schedule 133. (a) Each person operating or conducting an exhibition termed "Street Fair" or "Carnival" shall pay to the State a license as follows: For an exhibition operating or composed of or controlling or embracing not more than ten exhibitions or devices three hundred (\$300.00); but where more than ten and not exceeding twenty-five (25) devices, four hundred dollars (\$400.00); and where there are more than twenty-five devices, seven hundred and fifty dollars (\$750.00); for each place where said street fair is conducted. This license shall entitle the street fair to be operated for a period of not exceeding two weeks in any one place at any one time. (b) State, County, or District Agricultural Fairs. State, County or District Agricultural Fairs, as defined herein, operating without any midway, carnival or vending concessions shall be exempt from the payment of all state and county licenses or privilege taxes. (c) State, County or District Agricultural Fairs operating with midway, carnival or vending concessions, shall pay to the State a license as follows: In counties of over 150,000 population \$400.00. In counties of more than 75,000 and less than 150,000 population \$250.00. In counties of less than 75,000 population \$100.00. In addition to the above State licenses, there shall be paid for the use of the county in which such State, County or District Agricultural Fair operates, a sum equal to fifty per cent of the State license. The license tax herein levied shall be in lieu of all other State and County licenses or privileges taxes, except the Sales Tax and shall extend not only to said State, County or District Fairs in any of the lawful operations carried on in the conduct of such Fairs, but shall also extend to any person, firm or corporation, who, under contract with a State, County or District Fair, during the continuation of such Fair, and on the grounds thereof carries on any lawful business. The above license shall entitle such State, County or District Agricultural Fair to operate for a period of not exceeding two weeks in any one place at one time. On and after the first day of January, 1940, a State, County, or District Agricultural Fair, in order to obtain a license under this schedule, shall be defined as follows: A corporation or association composed of ten or more persons, which shall have been organized at least six months prior to the holding of the Fair, and which holds an annual fair and at which not less than twenty exhibits of agricultural, livestock or mineral products are shown and upon which prizes are offered."

By a comparison of Schedule 133, supra, and the 1939 amendment, it will be seen that the 1939 amendment is merely an enlargement of Schedule 133 and contains certain subject matter not included in the original schedule. No mention whatsoever is made of Schedule 34, supra, or any part thereof. Under the authority of **Pharr v. Whittle**, 237 Ala. 124, 185 So. 895, and cases cited therein, it is my opinion that the 1939 amendment of Schedule 133, supra, should be treated as if it were originally enacted in the Revenue Act of 1935. As there is no conflict between the 1939 amendment and Schedule 34, supra, it is my judgment that said amendment did not abrogate the exemption specified in said Schedule 34.

The premises considered, it follows that the exemption contained in Schedule 34, supra, is in full force and effect, and a street fair or carnival meeting the conditions thereof is entitled to said exemption.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 27, 1940.

Hon. James B. Little,
Building & Loan Commissioner,
Department of Commerce,
Capitol.

BUILDING AND LOAN ASSOCIATIONS—

A Building and Loan Association converted into a Realty & Mortgage Company under Act No. 459, H. 770, approved September 21, 1939 (General Acts 1939 p. 616, after January 1, 1940, which was doing business as a Building and Loan Association on January 1, 1940, is liable for an annual fee of \$50.00 and an annual assessment of 20c per thousand or fraction thereof on all its total assets as of December 31, preceding.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion under date of March 13, 1940, as follows:

"Section 12 of an act approved April 9, 1931, relating to the operation and supervision of Building and Loan Associations in Alabama requires each Building and Loan Association doing business in this state to pay to the Commissioner for supervision and examination.

"1. 'An annual fee of \$50.00.'

"2. 'In addition to the annual fee, each Association shall be required to pay an annual assessment of twenty cents per thousand or fraction thereof on all its total assets as of December 31 preceding.'

"Section 46½ of Act 459 approved September 21, 1939, permits by a favorable vote of two-thirds of its share-holders the conversion of a Building and Loan Association into a corporation organized under the general 'Incorporation Laws of the State.' Pursuant to this section 46½, the shareholders of an association voted to convert the association into a Realty and Mortgage Company, and the Building and Loan Association was so converted.

"On December 31, 1939, an annual report of the Association was filed. In compliance with Section 12 of the 1931 Act, and on February 13, 1940, a check for \$14.00 representing twenty cents per thousand dollars on its total assets was tendered the Department of Commerce of the State of Alabama for its Bureau of Building and Loan. The Officers of the old Building and Loan Association have refused to pay the annual fee of \$50.00 provided in Section 12 of the 1931 Act, and contend as follows:

"'On December 28, 1939, the stockholders (of the Building and Loan Association) voted to close out the Association on the first of the year. We have read Section 11 of the Building and Loan Laws and also Code 7111-Subsection 12, and unless we have not been pay-

ing this fee in advance we failed to find why we would be due to pay this fee for 1940.'

"We would like to have your opinion on the question of whether the association is due the full amount of \$64.00, the amount of \$14.00, as tendered by this Association, or no fees at all."

You further advise as follows:

"The Building and Loan Association referred to in my letter of March 13, 1940 was converted into a state corporation and the papers in connection with said conversation were filed in the Probate Court of Jefferson County, Bessemer Division, January 5, 1940."

In my opinion the Building & Loan Association is liable for the 1940 annual fee of \$50.00 and the annual assessment, which under your facts amounts to \$14.00.

I refer you to Sections 11 and 12 of Act No. 159 S. 116, approved April 9, 1931, General Acts, 1931, p. 218, providing as follows:

"Section 11. STATEMENTS TO BE FILED. Every association doing business within this state shall, on the first day of January of each year, or within thirty days thereafter, file with the Commissioner a full and detailed statement of its financial condition on the 31st day of the preceding December. Said statement shall set forth the amount and character of its assets, liabilities, income and expense and shall contain such other information and be in such form as the Commissioner may prescribe and shall be sworn to by the President and the Secretary or Treasurer of such Association; and such report shall show the number and amount of loans outstanding upon its books."

"Section 12. FEES. At the time of the filing of its annual statement every building and loan association doing business in this state shall be required to pay to the Commissioner for supervision and examination. (1) An annual fee of \$50.00. (2) In addition to the annual fee each association shall be required to pay an annual assessment of 20c per thousand dollars or fraction thereof on its total assets as of December 31st, preceding."

The language of the sections supra, is clear and unambiguous and, therefore, there is no room for construction of the same.

Alabama Digest Key No. 190 (Statutes) and cases cited thereunder.

The only question is: Was the Building & Loan Association doing business as such an association on the 1st day of January, 1940?

You answer this question by stating in your facts that the Building and Loan Association was converted into a Realty Corporation on the 5th day of January, 1940. Therefore, it is obvious that the Building and Loan Association was doing business as a Building and Loan Association on January 1, 1940. I refer you to Section 46½ of Act No. 459, supra, providing in part as follows:

" * * * In lieu of forming such corporation as provided by the general laws of this state, such new corporation may be formed after the holders of two-thirds (2/3) of the net book value of its outstanding shares of stock have consented thereto by the filing by the directors of said Building and Loan Association in the office of the Judge of Probate of the County in which such association has its principal place of business or in which it was incorporated, of a statement setting forth; (1) the name of the new corporation, (2) the objects for which formed, (3) the location of its principal office, and (4) the amount of the total authorized capital stock, and upon the filing and recording of such statement the said association shall become a new body corporate, but shall not carry on any further business as a Building and Loan Association or as a Savings and Loan Association."

The premises considered, it is my opinion that the old Building and Loan Association is liable for the full fee and assessment for 1940. See opinions of this office, **Biennial Report, Attorney General, 1928-30, pages 816 and 847.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 27, 1940.

Dh. Stuart Graves, Secretary,
Board of Nurses Examiners and Registration,
Box 2048,
University, Alabama.

Nurses Board of Examination and Registration of Alabama—
State Board of Adjustment—

1. Under Section 1185, Code of Alabama, 1923, as amended, Secretary-Treasurer of Board entitled to per diem for each day that Board is actually in session and functioning as a Board, in addition to salary fixed by the Board for Secretary-Treasurer.

2. Nurses Board of Examination and Registration of Alabama without authority to refund money voluntarily paid to it where no legal liability existed to make such payment, but money so paid may be refunded through the State Board of Adjustment, upon timely application or petition therefor being filed with the State Board of Adjustment.

3. Under the presently applicable statute, the Board may fix the salary of the executive officer of the Board, who shall not be a member thereof, and also allow such officer necessary expenses, said salary and expenses to be paid out of the moneys received by the Board.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 21, 1940, in which you request my opinion as follows:

"Mr. B. P. Singleton, Chief Examiner of Public Accounts, has suggested to the Board of Nurses Examiners and Registration for the State of Alabama that the Board request your interpretation of Section 1185 of the Code of 1923. The questions involved arise from the following circumstances. The Board had as its Secretary Treasurer for years until September 23, 1939, Miss Linna H. Denny, who was a member of the Board under the old law. House Bills 687 and 688 enclosed were signed by Governor Dixon on September 15 and on September 23 the reorganized Board at its first meeting accepted the resignation of Miss Denny as a member of the Board and as Secretary-Treasurer and immediately elected her as Executive Officer of the Board for an indefinite term. The minutes for the same meeting included the following paragraph:

"On motion of Doctor Heacock, duly seconded, the Board requested its Secretary to confer with the State Examiner of Accounts and see what could be done about \$313.00 charged back by the Auditor against Miss Denny, which had been paid to her during her term of service for examinations, over and above her regular salary. The fees had been paid the same as to the non-salaried members of the Board. Miss Denny pointed out that she had saved the Board \$454.00 by listing the telephone in the office of the Board as a private home in her name at \$3.50 per month instead of \$8.00 per month which would have been charged, had the phone been listed in the name of the Board."

"The paragraph in the report made by Messrs. Huffstutler and Mathison, Assistant Examiners, to Mr. Singleton covered the accounts of the Board from January 1, 1931 to May 31, 1939. The report was quite commendatory to Miss Denny, but did include the following paragraph:

"It was found that the Secretary and Treasurer had been paid in some instances additional compensation at the rate of \$5.00 per diem for services rendered the Board. This was done by the approval of the Board and its President, who countersigns all checks drawn from this Fund. These payments to the Secretary and Treasurer in the aggregate sum of \$313.00 are charged to the Secretary and Treasurer, inasmuch as they were made in contravention to the law governing compensation to the Secretary and Treasurer. Section 1185 of the Code of 1923 specifically sets out that the Secretary and Treasurer shall be paid a salary, the amount to be fixed by the Board, commensurate with the duties performed."

"Miss Denny refunded the amount in question promptly, but the Board feels that it is hardly fair to penalize her retroactively to that extent in view of the fact that her salary had been only \$1800.00 a year, that the books had been audited by a certified public accountant every year and approved by the Board annually, and that the small amount paid her over and above her salary for conducting examinations was in keeping with the nominal honorarium paid to the other members of the old Board for conducting examinations."

"An attorney of reputation has questioned the interpretation of Section 1185 of the Code as made by the Assistant Examiners mentioned above and the whole situation was discussed with Mr. Singleton at a conference in Montgomery on November 15th. Mr. Singleton suggested that it would be best to secure your interpretation of the Code. We would, therefore, appreciate your kindness in rendering your opinion to our Board on the following questions:

"(1) Were the fees paid to Miss Denny under Section 1185 of the Code during the years covered by the audit in addition to her \$1800 salary paid legally?

"(2) If so, has the new Board now, by unanimous action of the Board, the right to reimburse her for the refund of \$313.00, which she made at the direction of the Assistant Examiners?

"(3) Under the new law embodied in House Bills 687 and 688 enclosed herewith, has the new Board the right to pay such salary or other compensation as it sees fit to the Executive Office authorized by the new Board, who shall not be a member of the new Board?

"For your convenience, my copy of the audit in question is enclosed and I would appreciate your courtesy in returning it as soon as you have rendered your opinion on the three questions submitted. Perhaps it should be emphasized that no funds whatsoever are received by the Board from the State of Alabama. The Board's only income consists of the examination fee and the annual re-registration fees fixed by law for registered nurses."

Reference to the report of the examination made of the records of the Nurses Board of Examination and Registration of Alabama for the period from January 1, 1931, to May 31, 1939, discloses that of the amounts charged back by the examiners to the Secretary-Treasurer of the Board only \$310 thereof, instead of \$313, was per diem which had been paid to the Secretary-Treasurer of the Board for services as a member of the Board, in addition to the salary fixed by the Board for the Secretary Treasurer thereof.

In my opinion, the Secretary-Treasurer of the Board was entitled legally to the per diem provided by law for members of the Board for each day that the Board was actually in session and functioning as a Board, in addition to the salary fixed by the Board for the Secretary-Treasurer of the Board, and that, therefore, the amounts so paid to her should not have been charged back to her. The provision of our statutory law which governed this matter during the period covered by the examination hereinabove referred to was Section 1185 of the Code of Alabama, 1923, as amended by Act No. 486, S. 128, approved September 2, 1927 (General Acts, 1927, page 563), which reads as follows:

"1185. COMPENSATION AND EXPENSES OF BOARD. Members of said board shall receive five dollars per day for each day that the board is actually in session and functioning as a board, together with necessary expenses incurred in the discharge of their duties. The Secretary Treasurer shall receive a salary, the amount to be fixed by the board, commensurate with the duties performed, said salary and said fees to be paid out of the monies received by the board under the provisions of Section 1187 of the Code of 1923, and no part of the expenses incurred by this board shall be paid out of the State treasury. Any remaining funds, after all claims of the classes above named have been

paid, may be used to pay any claims heretofore or hereafter incurred by said board for the purpose of elevating the standards of schools of nursing and of promoting the educational and professional standards of nurses and nursing in this state. All money thus expended by this board shall be paid out of excess funds arising from examination fees, and no funds or monies used for such purpose shall be paid out of the State treasury."

As I construe the above quoted statutory provision, each member of the Board is entitled to five dollars per day for each day the Board is actually in session and functioning as a Board, together with necessary expenses incurred in the discharge of their duties, and, in addition thereto, the Secretary-Treasurer, who by Section 1183 of the Code of Alabama, 1923, must be a member of the Board, is entitled to a salary to be fixed by the Board. The fact that the Secretary-Treasurer of the Board is required by Section 1183, supra, to be a member of the Board, negates the idea that the Secretary-Treasurer should be a full-time employee of the Board. Nor are we confronted with the question of whether or not the Secretary-Treasurer of the Board holds two offices of profit, within the constitutional inhibition against the same, for the reason that, even though her position as a member of the Board may be an office of profit within the meaning of the constitutional provision in regard thereto, certainly, her position as Secretary-Treasurer of the Board is not an office of profit within the meaning of that provision, but is merely a position of employment.

Since this per diem was properly and legally paid to the Secretary-Treasurer of the Board for her services as a member of the Board, the repayment of the amount to the Board was in effect a voluntary payment of money where no legal liability existed to make such payment. However, I know of no provision of law which invests the Board with authority to refund to the Secretary-Treasurer the amount so paid by her. Your Board is one of strictly limited jurisdiction and may exercise only such powers as are conferred upon it by the Legislature, its creator. It is charged with the duty of devoting its funds to the ends prescribed by law and must point to a "thus saith the law" for every disbursement. **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235. No "thus saith the law" may be pointed to for the refund of this amount to the Secretary-Treasurer of the Board.

However, upon timely application or petition for a refund of this amount being filed with the State Board of Adjustment, the State Board of Adjustment has the jurisdiction, power and authority to refund this amount to the Secretary-Treasurer of the Board.

Section 2 of Act No. 546, H. 871, approved September 14, 1935 (General Acts, 1935, page 1164), which created the State Board of Adjustment, as amended by Act No. 173, H. 266, approved March 1, 1937 (General Acts, 1936-37, page 205), provides in pertinent part:

"Said Board of Adjustment is also empowered and it shall be its duty to hear and consider * * * all claims for money voluntarily paid to the State where no legal liability existed to make such payment. * * * As to claims arising after the date upon which this act becomes a law, all such claims must be presented to the Board within one year after the cause of action accrues unless the claim is first carried into the courts of the state, in which case the said statute of limitations shall not begin to run until the date on which a final decree in the same, hold-

ing the claimant not entitled to relief through the courts of the state is rendered; and if the same are not presented within said one year the board is prohibited from hearing and considering them."

Reference to the file copy of the report of the examination made of the records of the Nurses Board of Examination and Registration of Alabama shows that this amount was paid by the Secretary-Treasurer on or about June 29, 1939, so that there is yet time for an application or petition for a refund thereof to be made to the State Board of Adjustment.

Under the presently applicable statute, the Board has the authority to fix the salary of the executive officer of the Board, who shall not be a member thereof, and also to allow such officer necessary expenses, the salary and expenses to be paid out of the moneys received by the Board. Act No. 486, H. 687, approved September 15, 1939 (General Acts, 1939, page 698) provides in pertinent part:

"The Board shall employ an executive officer, who shall not be a member of the Board of Nurses' Examiners and Registration, who shall be appointed by the Board and shall hold office at the pleasure of the Board, and who shall perform such duties as may be specified by the Board from time to time; and who shall be responsible to said Board for the satisfactory performance of such duties. * * * Said executive officer shall give full time to the work of the Board, free from any other remunerative position, or work, and shall receive such salary as may be fixed by the Board from time to time, commensurate with the duties performed, together with such necessary expenses as may be authorized and allowed by the Board. Said salary and expenses shall be paid out of the monies received by the Board under the provisions of law, and no part of the expenses incurred by the Board shall be paid out of the State Treasury."

I am returning to you as per your request your copy of the report of the examination of the records of the Nurses Board of Examination and Registration of Alabama, which you furnished me for my information.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 28, 1940.

Hon. Coley Page,
Tax Collector,
Jackson County,
Scottsboro, Alabama.

Taxation—

Tax Collector not entitled to additional fee of 50c for making demand on a delinquent taxpayer for his city taxes under Section 201 of the 1935 Revenue Act, as amended by Act No. 57, approved February 27, 1939 (General Acts, 1939, page 67).

The Tax Collector should collect only one fee of 50c for making a demand against a delinquent taxpayer, although said delinquent taxpayer has more than one tax assessment.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request of February 26, 1940, which reads as follows:

"A question has arisen in this office on which we would like your advice.

"By way of explanation, please be advised that we collect city tax for two different cities in the County, and the Assessor has in his office an abstract of each city taxes, in addition to the abstract for the State and County taxes, and we have receipts for each city, separate and apart from the State and County receipts. We have been informed that we are entitled to collect a 50c fee on each city receipt where the taxes have become delinquent, in addition to the 50c fee which we collect on the State and County receipt. This, of course, applies to cases where the taxpayer owes city taxes on the same piece of property upon which he is paying State and County taxes. We want your opinion as to whether or not we are entitled to collect this 50c fee for delinquent City taxes.

"Also, we have several cases in the County where one person has several different assessments, and we, of course, have a receipt issued for each assessment in his name. Please advise us if we are entitled to collect 50c on each one of these assessments, where the taxes are delinquent, or should we only collect one fee from these taxpayers, even though he has several different assessments?"

In answering your questions, I am assuming that you are referring to the 50c for making a demand on a delinquent taxpayer as provided by Section 162 of the Revenue Act of 1935, which provides as follows:

"Section 162. For making actual demand on delinquent taxpayers, the collector shall be entitled to receive a fee of fifty cents from each taxpayer on whom such demand is made, which shall be charged against such taxpayer and collected for the use of the collector in the same manner and by the same means as taxes are collected, **but he shall charge only one fee against each taxpayer.** For making a levy on and sale of personal property for the collection of taxes, the collector shall be allowed a fee of one dollar, to be collected out of the property and in addition thereto, he shall be authorized to collect out of such property the actual expenses of keeping and moving the same to the place of sale, the collector may sell any personal property levied on at any place in the precinct that he may determine, or may move the same to the courthouse of the county for sale. For the levy on and sale of a tract, parcel or lot of land assessed to one owner, or to 'owner unknown' the collector shall receive a fee of fifty cents in addition to the demand fee on such delinquent taxpayer, the said fee to be made a part of the decree of sale and collected with the taxes due on the land sold or levied on for sale." (Emphasis supplied)

In my opinion, you are not entitled to collect an additional fee of 50c for making a demand on a delinquent taxpayer for his city taxes, as you are limited to only one demand fee on a delinquent taxpayer, such demand to include the delinquent State, County and city taxes. The fee of 50c provided under said section, supra, is for making the demand for the delinquent State and County taxes, and no additional fees attach by reason of the demand now including the delinquent city taxes.

Section 201 of the 1935 Revenue Act, as amended by Act No. 57, H. 183, approved February 27, 1939, (General Acts, 1939, p. 67) provides as follows:

"Section 201. Any municipal corporation in this State, may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided in this Chapter, and all the machinery herein provided for the assessment, equalization and collection of State and county taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as may be fixed by the governing body of such municipality, not to exceed one-half of one per cent for assessing and one-half of one per cent for collection, and if any municipal corporation has heretofore availed itself of the provisions of this section or shall hereafter do so by the adoption of an ordinance as provided for herein, there shall also be applicable to the assessment and collection of its taxes, the sale of property for the collection thereof, and the redemption from such sales, all such other machinery, procedure and provisions of law as are now applicable with respect to the assessment, levy and collection of municipal taxes of cities having a population of not less than 6500 nor more than 15,000, according to the last or any subsequent Federal Census. And such machinery, procedure and provisions shall apply to all uncollected taxes whether heretofore or hereafter assessed, provided the municipal corporation has heretofore adopted such ordinance."

I refer you to the following opinion of this office relative to the collection of taxes due a municipality under the 1939 act, supra: **Quarterly Report of Attorney General**, Vol. XV, p. 231; **Quarterly Report of Attorney General**, Vol. XVIII, p. 170.

In my opinion, you are limited by Section 162 of the 1935 Revenue Act, supra, to only one 50c fee for making a demand on a delinquent taxpayer although the taxpayer may have more than one assessment.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 28, 1940.

Hon. William J. Kern, Clerk,
Inferior Civil Court,
Mobile County,
Mobile, Alabama.

1. Execution may issue against a successful plaintiff for the costs accruing at his instance, when execution against the defendant has been returned "no property found."

2. It is the duty of the clerk of the court to issue execution on all judgments not satisfied or that have not become dormant by the lapse of ten years from rendition.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 16, 1940, in which you request my opinion as follows:

"Please enlighten me as to the following questions pertaining to the Inferior Civil Court of Mobile;—

"1. In a moot case of John Doe—vs.—Mary Roe, a judgment for \$50.00 and costs of court was rendered in March, 1933, in favor of the Plaintiff; an execution thereon was issued by the Clerk of said Court and was duly returned by the Sheriff of Mobile County uncollected and marked no property of the Defendant found in Mobile County; the Clerk did not issue an execution against the Plaintiff for the costs of Court; does it become the duty of the present Clerk of the said Court (who succeeded the said Clerk in office) to issue execution against the above named Plaintiff to recover the said costs?

"2. If it is the duty of the present Clerk to issue execution against the Plaintiff for costs of Court in cases where the former Clerk did not do so wherein does the statute of limitation act to bar the issuance of same?

"Inasmuch as I am faced with an almost immediate situation with respect to the above, would you please let me have your opinion as soon as possible?"

On March 22, 1922, this office rendered an opinion to the Chief Examiner of Accounts (Biennial Report of Attorney General, 1920-22, page 394), wherein it was held that it was the duty of the clerk of the Inferior Civil Court of Mobile County to collect costs actually created by plaintiffs, although such plaintiffs are successful when execution for costs against the defendant are returned by the proper officer, endorsed "no property found." The opinion referred to construed Section 9 of a local act of 1911 establishing the Inferior Civil Court of Mobile County (Local Acts, 1911, page 274). I have not been advised of any subsequent legislation materially affecting the provisions of Section 9 of the said local act.

I call to your attention the pertinent part of Section 7263 of the Code of Alabama, 1923, as well as Section 7805, Code of Alabama, 1923, which are as follows:

"7263. When execution against plaintiff for his own costs; penalty for failure to collect, etc.—The clerk of the supreme court, court of appeals, clerks of the circuit court, judges of probate, and justices of the peace, and registers, upon return of an execution 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, court of appeals, of the county from which the case was brought, may issue execution against the plaintiff, or against the plaintiff and sureties, or appellant and sureties as the case may be, for the costs actually created by the plaintiff, or appellant but for none other, to be collected and returned as other executions. * * *

"7805. When against plaintiff for his costs.—When execution against the defendant is returned 'no property found', execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

It is my opinion that it is your duty, as successor of the former clerk, to issue execution on all such cases not satisfied on your records which have not become dormant by a lapse of ten years from the rendition of the judgment.

I refer you to an opinion of the Attorney General rendered to the Chief Examiner of Accounts on February 13, 1924 (Biennial Reports of Attorney General, 1922-24, page 302), wherein it was held that such an execution might be issued within the ten-year period.

I also call your attention to the provisions of Section 7862, which provide as follows:

"7862. Execution issued and returned not satisfied; other may issue for ten years.—When execution has been issued on a judgment and has not been returned satisfied, other executions may be issued at any time within ten years after the rendition of the judgment, without a revival of the judgment."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 28, 1940.

Hon. J. Foster King,
Sheriff, Tuscaloosa County,
Tuscaloosa, Alabama.

The fee provided by Section 4654 of the Code of Alabama, 1923, must be paid into county treasury of Tuscaloosa County where seizure

is made by any officer acting under the authority of the sheriff of Tuscaloosa County or where such seizure is made by the sheriff himself.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 8, 1940, in which you request my opinion as follows:

"Referring to Section 4654, Page 529, Criminal Code No. 2. I would like to have your opinion whether commission Deputies are entitled to the seizure fee when he is in company with a Salary Deputy. If he is entitled to the same is it the duty of Circuit Clerk to pay this fee to the Commission Deputy or is it the Clerk's duty to pay this to the Sheriff and then the Sheriff make a bill and get it from the Board of Revenue.

"Please give me your opinion on this matter at your earliest convenience as I have several cases pending and I want to know if the Commission Deputy is entitled to this fee as I am on a salary and I have four field men and a chief deputy on a salary.

"I am enclosing a copy of the County Attorney's opinion."

Section 4654 of the Code of Alabama, 1923, to which you refer in your letter of inquiry, is as follows:

"Section 4654. Fees to be taxed for arrest and seizures in prohibition cases.—When an officer arrests any person in possession of an unlawful quantity or quantities of prohibited liquors, or of such liquors under conditions prohibited by law, then on the conviction of such party of a violation of a city ordinance or state law, whether in the recorder's court, or state court possessing jurisdiction, a fee for making the seizure of the liquors shall be taxed up against the defendant, and paid to such officer as a part of the cost of the case as follows: If a seizure is made of not less than one gallon, nor more than five gallons of such liquors, the fee shall be three dollars; if the seizure be of more than five gallons, and less than twenty gallons, the fee shall be five dollars; and if more than twenty gallons be seized, the fee shall be ten dollars."

I assume that the reference in your letter to commission deputies is to the deputies you are allowed to employ under the provisions of Section 6 of Act No. 93, S. 127, approved April 7, 1936, (Local Acts, 1936, p. 53), which section is as follows:

"Section 6. Be it further enacted that in addition to the chief deputy sheriff and deputy sheriffs provided for in Section 3, the sheriff of Tuscaloosa County, Alabama, may appoint as many special deputy sheriffs as he may desire to appoint, provided, however, that the compensation of said special deputy sheriffs shall not be paid by Tuscaloosa County, but shall be provided for by the Sheriff in such manner as he may be able to arrange."

The answer to your inquiry necessarily depends upon the intention of the legislature in enacting into law the aforementioned local act. It is apparent that it was the purpose of the legislature to place the sheriff and his deputies on a salary basis, an amendment to the Constitution of this state having previously been ratified by the people authorizing such legislation.

Section 8 of the aforementioned local act is in words and figures as follows:

"Section 8. That when this Act goes into effect said Sheriff shall continue to collect all legal charges, costs, fees, compensation and allowances heretofore or hereafter authorized to be collected by him, and shall pay the same into the County Treasury on the first Monday of each month after this Act becomes effective."

It is my opinion that the legislature intended that all fees, including fees provided for by Section 4654, earned by the sheriff or a deputy operating under the sheriff should be covered into the county treasury of Tuscaloosa County. I see no distinction in this regard between salaried deputies and special deputy sheriffs provided for under section 6 of the local act, *supra*. All of these deputies, regardless of where their compensation comes from, are in effect your agent and in my opinion, all costs or fees provided by law, which accrue at their instance must be covered into the county treasury.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 29, 1940.

Hon. H. E. Kendrick,
Tax Collector, Dallas County,
Selma, Alabama.

Tax Collectors—Reports—

Tax collectors who elect to come under the provisions of Act No. 60, H. 366, approved March 15, 1933 (General Acts, 1933, page 51), as amended, required to make reports and remittances weekly as well as on the first and fifteenth of each month, as provided for by Section 192 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256).

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 16, 1939, in which you request my opinion as follows:

"I desire to have an opinion at earliest convenience reconciling the following Acts of Alabama:

"Acts 1933, page 52, Section 6 provides for weekly reports by Tax Collectors, and oftener should he have on hand for a period of 24 hours more than \$7,500.00.

"Acts 1935, page 345, Section 192, is a part of the General Revenue Law, and provides among other things for a report by Tax Collectors on the first and fifteenth day of each month and a payment of funds collected by him to the proper authorities of the monies collected, including County, School and State funds.

"Acts 1935, page 1119, amends Section 6 of Acts 1933, page 52, (first herein mentioned) by providing for weekly reports and distributions to proper authorities, and as often as it may be necessary to prevent his having on hand at any time for a period of more than 10 days more than \$7,500.00.

"1. Please advise as to whether Sec. 192 of the General Revenue Law, above quoted, repeals Act of 1933, page 52 in regard to making reports?

"2. If the 1935 General Revenue Law repeals that law in regard to reports, what is the effect of the 1935 Act, page 1119, amendatory of the 1933 Act, page 52?

"3. If under 1935 Act, p. 1119 the Collector is required to make reports and remittances every week, how can he have \$7,500.00 on hand more than ten days?

"It is my desire to know what construction would be placed upon these three Acts, their relation to one another, and which one would I follow in the matter of making reports and remittances, as they appear to me to be in conflict with one another. The Acts of 1933 above quoted and its amendment in the Acts of 1935, p. 1119, as to reports to be made and remittances to cover, seem to be provided for in the General Revenue Act of 1935, page 345, Sec. 192."

I understand your request to be in substance as follows: When must the tax collector make reports and remittances under the provisions of the following acts of the Legislature:

1. Act No. 60, H. 366, approved March 15, 1933 (General Acts, 1933, page 51).

2. Act No. 531, H. 954, approved September 14, 1935 (General Acts, 1935, page 1119).

3. Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256, Section 192)?

In reply, I wish to refer first to the Act of 1933, above named, and to Sections 6 and 7 thereof, which provides as follows:

"Section 6. In the event of the naming of such depository for the County Tax Collector of any county and the use of such depository by

him, such County Tax Collector shall make weekly reports, distributions and remittances to the proper authorities of the funds so deposited; and as often as it may be necessary to prevent his having on hand at any time for a period of more than twenty-four (24) hours more than \$7,500.00.

"Section 7. The provisions of this Act are not exclusive but cumulative and remedial, and this Act shall not be construed as abolishing any other method or manner now provided by law for the making of official bonds of county officers, or handling funds of county officers coming into their hands as such officers. And, provided further, that nothing herein shall relieve any public official from making official bond as is now required by law, nor from liability thereon except as is provided by this Act."

The provisions of Section 6 of the above named Act of 1933 were amended by the named Act of 1935, found on page 1119 of the General Acts of 1935, to read as follows:

"Section 1. That Section 6 of the General Acts of 1933, page 52, be and the same is amended to read as follows: Section 6. In the event of the naming of such depository for the County Tax Collector of any County and the use of such depository by him, such County Tax Collector shall make weekly reports, distributions and remittances to the proper authorities of the funds so deposited; and as often as it may be necessary to prevent his having on hand at any time for a period of more than ten (10) days more than \$7,500.00."

In my judgment, attention is to be directed to the known history of the origin and passage of Act No. 60, H. 366, approved March 15, 1933 (General Acts, 1933, page 51). It is well known that this law came into being to meet a very unstable situation in the financial world, under which it was becoming more and more difficult to procure sureties for the bonds of officials charged with the handling of public funds. The enactment of this law (the 1933 Act above named), affords the tax collector seeking protection the opportunity to ask a county governing body to name a depository for the public funds coming into his hands. In my judgment, only those tax collectors who have so elected to seek the shelter of the above named Act of 1933 are expected to operate under its provisions. If the tax collector does, in fact, so elect and does request the naming of a definite depository for the funds collected by him, the said tax collector must necessarily meet all the provisions of this, the named 1933 Act, and make weekly reports and remittances, as required therein, as the same was amended in 1935, as above quoted.

It is further my opinion that all tax collectors are required to meet the requirements of Section 192 of the 1935 Revenue Law, as quoted, *supra*. The provisions of Section 192 of the named Revenue Law of 1935, require a report from the tax collector on the first and fifteenth of each month with a remittance within five days after the making of the report. This provision, in my judgment, is general and applicable to all tax collectors in the State. The provisions of the named 1933 Act are cumulative and if the tax collector elects to receive the benefits offered by the 1933 Act, *supra*, he must meet its demands in all respects, in addition to meeting the requirements of Section 192 of the 1935 Revenue Law, which provides, in part, as follows:

"Section 192. The tax collector on the fifteenth day of October of each year, and on the first and fifteenth day of each month thereafter until he makes his final settlement for such year, shall make under oath, to the county treasurer and school treasurer, or if there be no county treasurer and/or school treasurer in the county, to the custodian of the funds of the county and schools an itemized report in writing, a copy of which shall be by the collector forwarded to the State Comptroller, and a copy filed with the probate judge, setting forth separately the taxes, interest and/or penalties collected by him for the State, county and schools, since the making of his last report, and within five days after making such report, he must pay to the State Treasurer all State taxes, interest and/or penalties then due from him to the State, and he must also pay to the county treasurer and to the school treasurer, or if there be no county treasurer or school treasurer in the county, to the custodian of the funds of the county and of the schools, all county taxes, interest and/or penalties and all school taxes, interest and/or penalties then due from him to the county and to the schools, by him before that time collected. The county treasurer and the school treasurer, or if there be no county treasurer and/or school treasurer in the county, then the custodian of the funds of the county and of the schools, shall give to the collector a receipt in duplicate of such semi-monthly payment, one of which duplicates shall be promptly forwarded to the State Comptroller by the tax collector. If no collection of taxes, interest and/or penalties have been collected by the collector prior to any reporting date, he shall make the report herein required stating under oath that no taxes, interest and/or penalties were collected during the period for which the report is made. * * *

I call your attention to Section 7 of the named 1933 Act above quoted, which provides that the provisions of the said 1933 Act shall be cumulative and shall not be construed as abolishing any other method or manner now provided by law for the making of official bonds of county officers or handling funds of county officers coming into their hands as such officers.

Premises considered, it is my opinion that all tax collectors must make reports of the funds collected by them, as provided for by Section 192 of the Revenue Law of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256). Those tax collectors who have elected to come under the provisions of Act No. 60, H. 366, approved March 10, 1933, as amended by Act No. 954, approved March 10, 1933, as amended by Act No. 531, H. 954, approved September 14, 1935 (General Acts, 1935, page 1119), must make weekly reports and remittances, in addition to the reports required on the first and fifteenth of each month, as required by the quoted provisions of the above quoted 1935 Revenue Law.

It is my opinion that no field of operation can exist for the provision in the said 1933 Act, as amended, which specifies "to prevent his having on hand at any time for a period of more than ten days more than \$7,500.00."

I wish to refer you to an opinion of the Attorney General, addressed to Hon. R. E. King, Tax Collector of Mobile County, under date of February 12, 1936, and reported in Quarterly Reports of the Attorney General, Vol. II, page 159.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 29, 1940.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Taxation—Exemptions—

The American Cyanamid and Chemical Corporation of Mobile held exempt from taxation as provided by Section 4 of the Revenue Law of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256), in so far as exemption is dependent upon production of aluminum products.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 12, 1940, in which you request my opinion as follows:

"American Cyanamid & Chemical Corporation, who have a plant in Mobile, Alabama, claim tax exemption under Section 4 of the Revenue Act of 1935, which is found on page 262 of the General Acts of 1935, and which reads as follows: 'Section 4: All real and personal property, except lands on which located, of factories or plants, manufacturing calcium cyanamid (lime nitrogen) aluminum or aluminum products, shall be exempt from State, County and municipal taxation for ten years after the beginning or construction of such plant or factory'.

"I am informed that the Cyanamid Company manufactures only one product in Mobile, and that product is aluminum sulphate. The Cyanamid Company manufactures aluminum sulphate from aluminum ore, which is the same base product with which the Aluminum Ore Corporation begins their manufacture in their Mobile plant. The Aluminum Ore Corporation makes aluminum oxide from the aluminum ore, and the American Cyanamid & Chemical Corporation makes aluminum sulphate from the aluminum ore,

"I am enclosing an affidavit from one of the local officials of the Cyanamid Company with reference to the products manufactured by their Company, and I am also enclosing an affidavit from James Backes, a chemist here in Mobile, reciting that in his opinion, aluminum sulphate is an aluminum product. I am enclosing this affidavit from Mr. Backes, feeling that you would probably desire to refer this matter to some chemist, for his opinion, and anticipating your desire, I have procured for you such an opinion.

"Would you kindly give me an official opinion as to whether or not I may exempt the Cyanamid Company from taxation under Section 4 above set out?"

In reply, I wish to advise that I requested information from Prof. C. L. Hare, State Chemist at Auburn, Alabama, and, supplementing your statement of facts, have set out my request and his reply thereto below, as follows:

"Professor C. L. Hare,
State Chemist,
Auburn, Alabama.

"Dear Sir:

"Will you be kind enough to give me your written opinion on the following question: Is aluminum sulphate an aluminum product?

"My interest in this question arises in connection with an opinion to be rendered to Hon. R. E. King, Tax Collector, Mobile County, Alabama, concerning whether or not, from a chemical standpoint, aluminum sulphate is a product of aluminum. This is solely a question for determination in the preparation of an official opinion to the above named tax collector and becomes necessary to be determined before the law governing tax exemptions on aluminum products may be properly construed.

"Thanking you very kindly for your assistance in this matter, I am"

"Auburn, Alabama

March 26, 1940

"Honorable Clarence M. Small
Assistant Attorney General
Montgomery, Alabama.

"Dear Sir:

"I have your letter of March 25 inquiring with reference to aluminum sulphate.

"In reply I would say that aluminum sulphate is an aluminum product. The substance appears in comparatively small quantities in nature in some shale deposits. It may also be prepared by the action of sulphuric acid on the metal aluminum. From any standpoint, aluminum sulphate is a product of aluminum.

"If I can give you further information on this matter, I shall be glad to do so.

Very truly yours,

(Signed)

C. L. Hare

State Chemist."

The affidavit presented to you by Mr. James Backes, who you state is an official of the American Cyanamid and Chemical Corporation, is as follows:

"STATE OF ALABAMA,
COUNTY OF MOBILE.

"My name is James Backes. I am a Chemical Engineer by profession, having attended Alabama Polytechnic Institute (Auburn) and having graduated there in 1933 with a B. S. Degree in Chemical Engineering. Since my graduation from Auburn, I have been engaged in Mobile, Alabama, in the practice of analytical and consulting chemistry.

"Aluminum sulphate is manufactured from aluminum ore, which is the same base product or raw material with which the manufacture of aluminum is commenced. Aluminum sulphate is an aluminum product, and in fact, contains the chemical element aluminum. Any product which is manufactured from aluminum ore contains the basic element aluminum, it not being possible to manufacture any product from aluminum ore which does not contain this element. The reason, therefore, that I say aluminum sulphate is an aluminum product is that it is manufactured from aluminum ore, and necessarily contains the element aluminum. I therefore conclude that it is an aluminum product.

(Signed) James Backes

"Subscribed and sworn to before me,
this the 12th day of March, 1940.

(Signed) Marion R. Vickers
Notary Public, Mobile County, Ala."

From the above affidavit and letters supplementing your statement of facts, I assume that aluminum sulphate is an aluminum product. Beginning with this assumption and the state of facts, as supplemented, we are called upon to decide only one question, viz., is the American Cyanamid and Chemical Corporation entitled to the exemption from taxation as provided by Section 4 of the Revenue Law of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256)? Tax exemptions must be strictly construed in favor of the taxing power. **Holt v. Long**, 275 Ala. 369, 174 So. 759. On this point, I should like to further refer you to an opinion addressed to Hon. R. E. King, Tax Collector, Mobile County, under date of November 21, 1939, and authorities cited therein. The above quoted rule and the cited authorities are applicable to a construction of statutory exemptions from taxation. The provision of law under consideration is quoted by you and I wish to refer you to it. It will be noted that the language of the exemption is clear and unequivocal in so far as the naming of aluminum products is concerned. You will note that the exemption of the American Cyanamid and Chemical Corporation is confined to the factories or plants which actually manufacture the aluminum product here considered, with the properties composing such plant or factory. I wish to refer you to an opinion of the Attorney General addressed to Hon. John C. Curry, Commissioner of Revenue, under date of January 26, 1940, copy of which is enclosed.

I also wish to further refer you to an opinion addressed to you under date of November 21, 1939, cited *supra*.

In my judgment, the statute is too clear in its designation of aluminum products to admit construction. When the language of a statute is clear, no construction may be had. **H. G. Fain v. State**, 23 Ala. App. 239, 124 So. 119.

The premises considered, it is my opinion that the factory or plants of the American Cyanamid and Chemical Corporation are exempt from taxation in so far as the exemption is dependent upon the manufacture of aluminum products, and as provided for in the above quoted 1935 Revenue Law, as quoted by you in your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

March 29, 1940.

Hon. Chris J. Sherlock,
State Highway Director,
Capitol.

Highways—Postal Telegraph & Cable Company and Southern Bell Telephone & Telegraph Company in City of Mobile, Alabama, not liable for cost of relocating and readjusting their facilities under Project FAGM 217-C(1), the work being done by the State Highway Department.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated February 23, 1940, which follows:

“Re: FAGM 217 C(1) ON—St. Joseph Street, Mobile, Alabama.

“We are preparing to begin construction on a grade separation project on St. Joseph Street in Mobile, Alabama, said project involving the relocation and readjustment of facilities of the Postal Telegraph & Cable Company and the Southern Bell Telephone & Telegraph Company.

“We attach hereto copies of franchises granted by the City of Mobile to each of the above named Companies granting the right to each of these Companies for the placing of their facilities within the limits of St. Joseph Street. We attach also copy of an Opinion from the City Attorney at Mobile with reference to the State Highway Department's authority to require these Companies to adjust their facilities to the new construction.

“Will you please advise if the Opinion of the City Attorney of Mobile is correct, or does the State Highway Department have the authority under the franchises granted by the City of Mobile to require the above

named utility companies to readjust their facilities to conform to the State's new construction without expense to the State."

It is my judgment that the opinion of the City Attorney of Mobile, hereto attached, is correct.

An examination of the franchises granted the Postal Telegraph & Cable Company and the Southern Bell Telephone & Telegraph Company shows that said companies would be liable for the cost of relocating and readjusting their facilities where a grade-separation project is done at the instance of the City of Mobile. However, the franchises impose no such liability upon the said companies when the relocation and readjusting of their facilities are brought about at the instance of the State of Alabama.

Cf. opinion of this office rendered to Hon. Gaston Scott, President, State Highway Commission on August 1, 1935, Attorney General's Opinions, Office Edition, Vol. 6-A, page 13. See also opinions of this office rendered to Hon. Gaston Scott, President, State Highway Commission on October 24, 1935, November 19, 1935, and December 7, 1935, found on pages 114, 192 and 318, respectively, of Quarterly Report of Attorney General, Vol. I, and opinion of March 9, 1936, Quarterly Report of Attorney General, Vol. II, page 285.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 29, 1940.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Taxation—Exemptions—

State Docks Commission—Not authorized to exempt from property taxation, the plant, land, and improvements thereon, of a private corporation contracting to use the facilities of the Port of Mobile exclusively for shipment of its materials and products.

Constitution, Amendment No. 12;
General Acts, 1935, p. 821;
General Acts, 1927, p. 1;
Code, 1923, Sections 2547-53;
Michie's Code, 1928, Sections 2539, 2560, 2541(1);
Michie's Supplement, Code, 1936, Section 2538.
Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of January 18, 1940, which follows:

"American Cyanamid and Chemical Corporation who have a plant in Mobile, Alabama, claim tax exemption by virtue of a contract entered into between it and Alabama State Docks Commission, a copy of the contract being enclosed in this letter.

"The plant of the Cyanamid Company is located immediately adjacent to the plant of Southern Kraft Corporation, and the land on which the plant of Southern Kraft is located is within the confines of the general plan of the State Docks Commission.

"You will note from the enclosed contract, which was made prior to the Cyanamid Company coming into Mobile, that it provides substantially as follows: 1. For the extension of the right-of-way of the terminal railway operated by the Docks Commission to the plant of the Cyanamid Company, and for the payment by the Cyanamid Company of the cost of the extension; 2. The lease of the easements, privileges and rights of said right-of-way to the Cyanamid Company for ninety-nine years; 3. The binding of the Cyanamid Company to use the facilities of the State Docks; 4. The extension of the general plan of the State Docks, so as to include the plant of the Cyanamid Company; 5. The grant by the Docks Commission of tax exemption for a period of ten years to the Cyanamid Company as to the improvements erected by them.

"I am informed by Mr. Ed Sauls, General Manager of the Alabama State Docks, that the Commission, in this and at least one other instance, construed the act creating it, to give them authority to make the exemption granted in the attached contract. Section 7 of the Act, which may be found at page 821 of the General Acts of 1935, provides that among other things, the State Docks Commission has authority to exempt from taxation, industries located within the boundaries of the approved plan or within the boundaries of any amendment or extension thereof, and since the Docks Commission would have authority to grant exemption from taxation in any amendment or extension of the general plan, therefore it is impliedly given authority to amend or extend the general plan. The contract attached hereto does extend the general plan so as to include the plant of the Cyanamid Company.

"This contract was approved by the Governor of Alabama and his approval signified by his signature thereto and by the attestation of the Secretary of State. As stated above, the plant of the Cyanamid Company is located immediately adjacent to what was theretofore the limit of the general plan of the State Docks Commission and it is their contention that under the statute, the State Docks Commission has authority to enlarge its plan so as to include any plant which would be located in such reasonable proximity to the State Docks that it could contract for the exclusive use of the facilities of the State Docks Commission.

"Would you kindly give me an official opinion as to whether or not I may accept the contention of the Cyanamid Company and not demand the payment of taxes from them.

"I am also enclosing copy of portion of minutes of State Docks Commission extending general plan."

The question is in substance whether the Commission by virtue of an Act, No. 385, H. 432, approved September 9, 1935, (General Acts, 1935, p. 821—Michie Code Supplement, 1936, Section 2538), amending Section 7 of Act No. 1, H. 28, approved January 17, 1927 (General Acts, 1927, pp. 1, 5), may by resolution extend or enlarge the area or territory theretofore designated as an approved plan, so as to exempt from all State, county and municipal taxation the property of a corporation engaged in manufacturing at a plant wholly within the enlarged or extended area.

The Act of September 9, 1935, aforementioned, empowers the Commission, with the approval of the Governor, "to acquire, purchase, install, lease, construct, own, hold, maintain, equip, use, control and operate at seaports, wharves, piers, docks, quays, grain elevators, cotton compresses, warehouses and other water and rail terminals and other structures, and facilities needful for the convenient use of the same in the aid of commerce including the dredging of approaches thereto," etc.

To that end the Commission is required to "**submit plans**, including estimates of cost, prepared by competent engineers or architects, to the Governor" and the Governor may make "other and further investigations in regard to the **desirability of such proposed acquisition or erection of facilities as above mentioned.**" (Underscoring ours) (Michie's Supp., 1936, Section 2538).

The act further reads:

"**The plans** heretofore approved by the Governor and any and all other plans hereafter submitted by the Commission and approved by the Governor may be **amended, changed, or enlarged** by the Commission with the approval of the Governor * * * provided the total cost of the entire development shall not exceed ten million dollars." (p. 823)

This is followed by provision for acquisition by the Commission of all necessary facilities for transportation in connection with the development and operation of ports and harbors (pp. 823-4) and authority to make agreements in reference to wages and working conditions in accord with the Federal Railway Labor Act.

It is further provided that "**title** to all property acquired * * * shall vest in the State of Alabama," and that the Commission, with approval of the Governor, may "dispose of, sell or lease to others * * * any of **said property, equipment and facilities.**"

The Act, in part, also reads as follows:

"**All leases of real estate within the boundaries of the approved plan or boundaries of any amendment or extension thereof, for port or harbor improvement** * * * and also all structures and all improvements and all other permanent facilities erected, installed or located, by lessees * * * **within the boundaries aforesaid**, shall be free and exempt from all State, county and municipal taxation for such period as may be stipulated in the lease," etc.

The remaining provisions of the Act are not in my opinion pertinent to the question under consideration.

From the papers submitted with your request, it appears that at a meeting held August 29, 1938, the Commission adopted a resolution:

"That the existing approved plan for port and harbor improvement in and by the State of Alabama, at the Port of Mobile be, and the same hereby is, amended and extended, subject to the approval of the Governor, so as to embrace in said plan, in addition to the area already embraced therein, the following described parcel of land situated in Mobile County, Alabama, to-wit, described by metes and bounds, and "having an area of 23.78 acres more or less," together with a "right of way described in that certain conveyance by the Tennessee Land Company to the State of Alabama, * * * described in that certain conveyance * * * dated July 7, 1938, and recorded in the Probate Court of Mobile County, Alabama, on the 15th day of August, 1938."

It further appears that the 23.78 acre tract adjoins certain land theretofore held by the State for harbor development, and that said tract had previously been acquired by American Cyanamid & Chemical Corporation, a corporation under the laws of Delaware, and that "the Commission has determined that the location of said chemical manufacturing plant upon the above described property will materially aid in the development and promotion of the harbor and seaport at Mobile * * * and desires an undertaking on the part of Cyanamid to use the said docks and terminal facilities."

There is nothing to show that the "extended or enlarged" area of 23.78 acres is to be used or can be used for "wharves, piers, docks, quays," etc., as provided in the Act of 1935, aforementioned, or that the same is to be acquired or has been acquired or purchased by the Commission for such purposes or for any other purpose.

Apparently, stripped of verbiage and recitals, the agreement between the Cyanamid Company and the Commission, is in substance and effect as follows:

(a) The Commission, as a State Agency, leases to the Company for 99 years the aforementioned right of way, upon an annual rental of \$1, and will receive from the Company revenue in the form of freight charges "all at the published rates and charges of the Commission."

(b) (c) The Company is to have ingress and egress to and from its plant over the State's land subject to the right of way, by means of roads and pipe lines thereover, poles, wires, etc., necessary in the operation of the plant.

(d) The State further agrees to extend a spur track from its terminal railway to the company's land.

The agreement further exempts from taxation for ten years the right of way, pipe lines, "buildings, structures, erections, houses, factories, plants, machinery, equipment and improvements of whatever kind whether or not of like kind with those enumerated by Cyanamid * * * located or in any manner placed in, upon, along or across property lying within the boundaries of said Approved Plan for Harbor Development."

It is further provided that such exemption shall extend to "additions, improvements and extensions, * * * for and during the unexpired part of said ten (10) year term."

In consideration whereof Cyanamid agrees during the term of tax exemption to use exclusively the State's "docks, wharfs (sic), transit sheds and other terminal facilities * * * for the handling of such of its materials and products as may move in commerce to and from its said manufacturing plant by water," and to use the State's terminal railway "for the movement to and from its said plant of such of its materials and products as may move in commerce by rail," and, by inference, to pay reasonable charges for use of such facilities.

There are other details and provisions of the agreement not necessary to be considered, in my opinion.

The resolution and agreement executed December 1, 1938, were duly approved by the Governor.

The ultimate question is as to the power of the Commission and the Governor by the procedure above indicated, to exempt from taxation the property of the Cyanamid Corporation. That involves, in my opinion, the question as to the meaning of the words, plan, plans, approved plans, and amended, changed and enlarged plans, as used and contemplated by the Legislature in the Act under consideration.

It is to be noted that so far as is expressly stated by the statute, such plans are to be formulated in connection with the exercise by the Commission with the approval of the Governor, of its power and authority to acquire, purchase, install, lease, construct, own, hold, maintain, equip, use, control and operate wharves, piers, docks, quays, grain elevators, cotton compresses, warehouses and other water and rail terminals and other structures, and **facilities needful for the convenient use of the same in the aid of commerce.** Likewise any amendment, change or enlargement of such plan must necessarily relate to the same subject matter and be made for the same purposes as the original plan. Otherwise the alleged amendment, change or enlargement cannot in any true sense be so termed. Such power of amendment surely cannot be converted into or construed as authority to adopt a plan radically different from the original plan and having no logical relation thereto.

Nor can it be contended that under guise of amendment, change or enlargement some plan may be made effective by the Commission with the approval of the Governor that was outside the intention of the Legislature, as clearly expressed in the statute.

I am driven to the conclusion, therefore, that in attempting to add to the area or boundaries of land embraced in the original approved plan, acquired and held for the purposes stated in the Act, by adding thereto the 23-acre area, owned and held by the Cyanamid Corporation for its own purposes of manufacturing, thereby exempting all improvements on said tract made or to be made, together with the land itself, the Commission exceeded its authority.

The Commission, although an agency of the State, and the Governor as well, are restrained by the legislative will, and can exercise only such powers

as are expressly granted to them by legislative enactment, subject to such restraints, if any, as may be imposed by the Constitution or the organic law itself. **In re Opinions of the Justices**, 209 Ala. 593, 595-6, 96 So. 487 (1923); Constitution, 1901, Sections 42, 43.

Section 2560 of Michie's Code, 1928, codifying Section 16 of Act No. 1, H. 28, approved January 17, 1927 (Acts, 1927, pages 1, 12) directs and requires the Governor and Commission to exercise the power and authority conferred upon them by the Act, "to whatever extent is necessary to the accomplishment of the improvement and development thereby authorized," in respect of harbors and seaports.

But it may be doubted whether this injunction can operate as authority to them to exempt from all ad valorem taxation property used primarily and exclusively for manufacturing purposes in no wise connected with or pertinent to the development, improvement or operation of the Port of Mobile.

Realizing possibly the force and effect of such restraints, the Commission, by numerous and lengthy recitals, both in the resolution and in the agreement whereby it is sought to create the exemption, point out the need of additional revenue for the operation of the port, to be derived from charges made for services and increased volume of traffic arising from the location of the plant on property adjacent to the boundaries of the original plan. It appears also that the plant has been, or will be so located on the faith of the resolution and agreement.

But it is difficult to see how this can operate as an implied power to the Commission and the Governor, under color of amendment or enlargement of the original "plan," or extension of the boundaries of the plan to land not owned, acquired, leased, or held by the State for harbor purposes, and to land in fact owned, acquired and held by a private corporation for its own exclusive purposes of manufacturing, thereby to grant exemption from taxation of the land and all improvements thereon, so owned, held and acquired.

If so, no good reason is perceived why the Commission might not likewise grant such exemptions to any manufacturing plant, however remote, within the State, provide only it contracted therewith to handle through the port its products and materials moving in commerce by water.

It is hard to believe that the Legislature could have intended by anything to be found in the Docks Commission Act to delegate so broad and comprehensive a power to exempt from taxation.

Tax exemption statutes are to be construed favorably to the taxing power, and unless the exemption is made clearly to appear, it cannot arise by inference or intendment. **Cooley on Taxation** (3 ed.) p. 357; **State v. Tuscaloosa Cottonseed Oil Co.**, 208 Ala. 610, 95 So. 52; **Hattermer v. State Tax Commission**, 235 Ala. 44, 177 So. 156; **Holt v. Long**, 234 Ala. 369, 174 So. 759; **Hawkins, Probate Judge v. Pure Oil Co.**, 232 Ala. 660, 169 So. 307; 61 C. J. 396.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 30, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Clerk of Circuit Court—Liability for failure to issue execution—
Prima facie case from examiner's report—

In a suit against Clerk of the Circuit Court or the surety upon his official bond for failure to issue execution on judgments, the introduction of the examiner's report of the investigation of the affairs of his office which reflects the number of cases in which execution was not issued and the amount of the items for which execution should have been issued, does not make out a prima facie case that the executions, if issued, could have been collected by reasonable diligence, and that, therefore, injury was sustained by the negligence of the Clerk in that regard.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 2, 1940, in which you request my opinion as follows:

"One of my Examiners has turned in a report on his examination of the books and records of the Clerk of the Circuit Court in a certain county in Alabama. In this report the Examiner has charged the Clerk with the amount of the trial tax in certain cases in which the Clerk failed to issue execution within the time prescribed by law.

"Please refer to your ruling on Page 242, Biennial Report 1934-1936, and to Section 746 of the Code, and advise me whether it is the duty of the State, before recovery can be made, to show that it suffered injury as a result of the negligence of the Clerk in failing to issue such executions, or whether the burden of proof rests upon the Clerk to show that no injury resulted.

"It would seem that the burden of proof should rest upon the Clerk, inasmuch as Section 746 of the Code makes these reports public records and prima facie evidence of what they charge."

As I understand your request, it involves the question of whether or not, in cases in which the report of examiners of accounts charges the Clerk of the Circuit Court, dealt with therein, with the amount of the trial tax in cases in which the Clerk failed to issue execution on judgments within the time prescribed by law, and subsequently the matter is referred to the proper State agency for suit against the Clerk or the surety on his official bond, the fact that the examiner charged the **amount** of the trial tax in such cases shifts to the Clerk or the surety on his bond, either or both, the burden of showing that the Clerk's negligence in and about the issuance of such executions did not result in injury to the State and County.

We dealt with one phase of the question in an opinion to the State Comptroller under date of July 19, 1935, Biennial Report of Attorney General, 1934-36, p. 242, to which former opinion your request refers. We there held, as relates to charges for failure to issue executions that:

"The charging back of such item to a public officer by the auditing department of the government is not in any sense an adjudication of the liability of the officer for the amount of the item. The question of whether such action should be taken by the auditing agency without first instituting an exhaustive inquiry as to the damage sustained, if any, by reason of the alleged negligence of the officer, is one which addresses itself to the sound judgment and discretion of the executives of that agency."

In my opinion, the rule there announced holds, notwithstanding Section 746 of the Code of Alabama, 1923. That section provides:

"Section 746. Reports of examiners to department.—The examiners shall make sworn reports in triplicate, of their findings in state matter to the department within ten days after the completion of the work assigned, and triplicate reports on county work, two to the department, and the other to the judge of the circuit court or court having like jurisdiction, who shall in his oral charge call the attention of the grand jury thereto and have the same entered in full upon the minutes of the court. **Such reports shall be public records and shall be prima facie evidence of what they charge.**" (Emphasis supplied)

The effect of the underscored portion of the code section, *supra*, is not to change the rule of law, which universally obtains, that "one alleging injury on account of negligence must show that, by reason of such negligence, he has suffered damage."

In my opinion, the effect of the underscored excerpt of said code section, as relates to cases of failure to issue execution, is that when an examiner's report reflects charges against a Clerk of the court on account of his alleged negligence in failing to issue execution in cases in which issuance of execution was required in said court, the introduction in evidence of the report makes a prima facie case as to the **fact** of the failure to issue execution in such cases, and as to the amount of the items for which such execution should have been issued. However, the introduction of the examiner's report does not make out a prima facie case as to the fact that any damage was sustained by reason of the failure to issue such execution. In order to prove the item against the Clerk or his surety it is necessary that evidence be offered by the one claiming injury to show that damage was suffered on account thereof for the reason that, if the execution had been issued, it could, by reasonable diligence, have been collected.

The rule is succinctly stated by the late Mr. Justice Somerville in *Hurst et al v. Kirby*, 213 Ala. 640, 105 So. 872, as follows:

"Defendant showed that at the expiration of plaintiff's (the sheriff's) term of office that he had in his hands a number of executions, under which the clerk was entitled to items of cost, as to which plaintiff made no official return. But no evidence was offered to show that any of these executions could have been collected by reasonable diligence nor

that the clerk suffered any injury by reason of plaintiff's negligence in that regard."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 30, 1940.

Hon. W. H. Quillin,
Judge, Law and Equity Court,
Franklin County,
Russellville, Alabama.

Costs and Fees—Sheriff's Fees—

Sheriff held not entitled to arrest fee when defendant is arrested by sureties on bail bonds, as authorized by Sections 3384 and 3385, Code of Alabama, 1923.

Guard Fees—

Sheriff held entitled to guard fees each time defendant is committed to jail under legal process. Sections 3384 and 3385 held to authorize commitment of defendant to jail upon arrest by sureties on bail bond and surrender of said defendant to sheriff.

Sheriff held entitled to collect fee for each bond or undertaking returned to court.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 20, 1940, in which you request my opinion as follows:

"A defendant is arrested by the sheriff of the county on a proper writ of arrest issued out of the Law & Equity Court charging him with public drunkenness and the defendant when arrested was committed to the county jail. The sheriff released the defendant from custody on proper bail approved by the sheriff. Later the bondsmen obtained a certified copy of the bond from the clerk of the court and surrendered the defendant to the sheriff under authority of Section 3384 of the Code of 1923 and the sheriff committed the defendant to jail, the bondsmen having told the sheriff that they desired to be exonerated. Later the sheriff again released the defendant from custody by another bail bond being executed and approved by the sheriff. The defendant was convicted.

"Is the sheriff entitled to one arrest fee or two arrest fees?

"Is the sheriff entitled to one guard fee or two guard fees, the defendant having been committed to jail at two different times on this same case?"

"Is the sheriff entitled to two fees or one fee for approving the bonds, he having approved two different bonds in this case?"

In my judgment, your first question must be answered in the negative.

Sections 3384 and 3385 of the Code of Alabama, 1923, provide for the arrest of the defendant by the sureties on his bail bond. This appears to be the method adopted and circumstances governing the arrest and surrender of the defendant to the sheriff under your statement of facts. It appears that the sheriff did not arrest the defendant and that no process commanding the arrest of the defendant was ever presented to the sheriff under which he could have arrested the defendant. I wish to refer you to an opinion of the Attorney General addressed to Hon. Howard Kirby, Clerk of the Circuit Court, Etowah County, Alabama, under date of March 24, 1939, and reported in Quarterly Report of Attorney General, Vol. XIV, page 229, which clarifies my answer to your first question. I further refer you to the cases of **Gray v. Strickland**, 163 Ala. 344, 50 So. 152; **Bearden v. State**, 89 Ala. 21, 7 So. 755; **Nicholson v. Kilpatrick**, 188 Ala. 258, 66 So. 8.

In reply to your second question, I wish to advise that the sheriff is entitled to collect two guard fees under your statement of facts. It is my judgment that the sheriff is entitled to a guard fee each time he commits the prisoner to jail under legal process, and, in my judgment, the above quoted statutes provide for the commitment of the prisoner as set out by you. I wish to further refer you to an opinion of the Attorney General addressed to Hon. B. P. Singleton, Chief Examiner of Accounts, under date of January 24, 1940, a copy of which I enclose for your convenience.

In answer to your third inquiry, it is my opinion that the sheriff is entitled to a fee for each bond approved and returned to court. Cf. opinion rendered to you on January 24, 1940.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

March 30, 1940.

Hon. P. C. Black,
Judge of Probate,
Geneva County,
Geneva, Alabama.

Counties—Claims—

Where executrix of an estate of a deceased county official pays money to the county, in accordance with an examiners' report, which payment was erroneous and improper, she is entitled to be refunded the amount of said payment by the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 13, 1940, in which you request my opinion as follows:

"On March 8, 1938, Gordon C. Grantham, Clerk of Circuit Court and Ex-Officio Clerk of County Court of Geneva County, Alabama, died, and his widow, Alice G. Grantham, was thereafter duly and legally appointed Administratrix of his estate.

"At completion of audit of books of said Gordon C. Grantham as such Clerk, amounts shown to be due by him as Clerk for period from May 1, 1936, to March 8, 1938, were paid by Alice G. Grantham as Administratrix (paid during month of June 1939) but 5% commission allowed Clerks by law on amounts so paid was not deducted by Alice G. Grantham

"The said above amounts so paid by Alice G. Grantham as Administratrix could not be determined or paid by her until completion of audit, which was promptly done; most of amounts due represented monies collected by Gordon C. Grantham as Clerk to be paid in trust by him in cases where no final disposition or judgment was had until just before completion of audit above referred to.

"There was also paid Geneva County the amount of \$24.00 in trial taxes by Alice G. Grantham as Administratrix in civil cases, charged for failure to issue executions within 90 days after judgment, where proper investigation showed parties to these cases to be insolvent and to have been insolvent during time within which executions were required to be issued by law.

"Claim for reimbursement on above matters has been filed by Alice G. Grantham, Administratrix and is hereto attached for your consideration.

"Please render an opinion as to whether said claim of Alice G. Grantham as Administratrix of the Estate of Gordon C. Grantham, deceased, both as to commissions and/or trial taxes, can be properly and legally reimbursed by Geneva County."

Under your statement of facts, it appears that the administratrix of the estate of the deceased Clerk of the Circuit Court of Geneva County paid to Geneva County certain monies, in accordance with an examiners' report, and that said payment was improper in view of the fact that the charges were erroneous. See opinion of the Attorney General to Chief Examiner of Accounts dated March 30, 1940, copy of which is enclosed. Under this statement of facts, I am of the opinion that the county may refund to the administratrix the amount erroneously paid to the county.

Section 6755(4), Code of Alabama, 1923, provides:

“Section 6755. Authority of court.—The court has authority.—4. To examine, settle, and allow all accounts and claims chargeable against the county.”

In my judgment, the matter of your inquiry falls clearly within the provisions of the above quoted subsection.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

I N D E X

JANUARY — FEBRUARY — MARCH

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